FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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tary of Labor on behalf of I.B. Acton and others v. Jim Walter
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tary of Labor on behalf of F. Frederick Pantuso, Jr., v. Cedar Coal
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tary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No.
-79. (Judge Broderick, December 20, 1985.)

tary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No.
35-90. (Judge Melick, December 19, 1985.)

COMMISSION DECISIONS

January 8, 1986

DISCIPLINARY PROCEEDING : Docket No. D 86-1

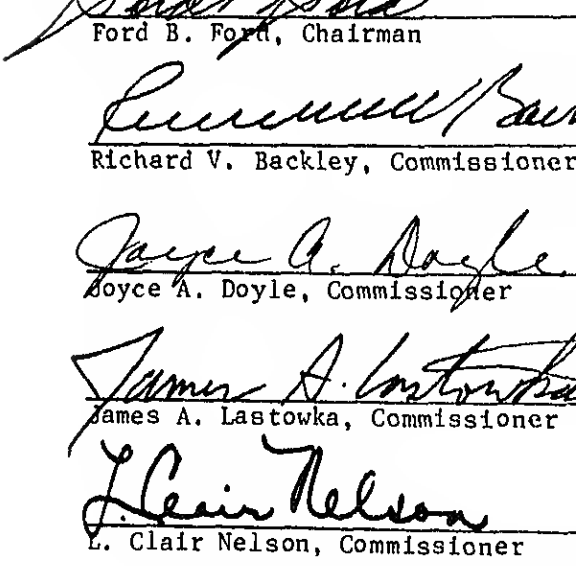
BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

On December 4, 1985, Commission Administrative Law Judge George A Koutras issued a decision in White Oak Coal Co., FMSHRC Docket No. VA 85-21, in which he held the respondent in default and, pursuant to Commission Procedural Rule 80, 29 C.F.R. § 2700.80, referred to the Commission for possible disciplinary proceedings the failure of the respondent's counsel to appear at the scheduled hearing. The respondent's counsel has filed a timely petition for discretionary review seeking review concerning only the judge's disciplinary referra

The petition for review is granted. The referral is severed fron the proceedings on the merits, is assigned the above caption and docke number, and is referred to the Chief Administrative Law Judge for assi ment to an administrative law judge for appropriate proceedings under Rule 80(c), 29 C.F.R. § 2700.80(c). See, e.g., Disciplinary Proceedi 7 FMSHRC 1957 (November 1985)(ALJ). If the attorney who is the subje of this proceeding is adversely affected or aggrieved by the subsequer



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January 29, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

PITTSBURG & MIDWAY COAL MINING
COMPANY

Docket No. CENT 83-65

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Min and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982)(the "Min It involves a single issue: Whether Pittsburgh & Midway Coal M Company ("P&M") violated 30 C.F.R. § 77.202, a mandatory safety which provides: "Coal dust in the air of, or in, or on the surf structures, enclosures, or other facilities shall not be allowe exist or accumulate in dangerous amounts." Following a hearing merits, a Commission administrative law judge concluded that P& the standard and assessed a civil penalty of $400. 6 FMSHRC 13 1984)(ALJ). We affirm the judge's decision.

The violation occurred at P&M's McKinley Mine. The mine several surface facilities used in the processing of coal. Amo facilities is a coal transfer building. In this building coal ferred onto a conveyor belt, and, as a result of the transfer, enters the building's atmosphere. At the top of the building tipple control room. The control room serves as an observatio from which the coal processing operations are monitored. In t are two electrical control boxes, the main breaker box and the crusher box. The main breaker box, as the name implies, conta circuit breakers. Inside the main crusher box are a motor sta

depth of at least 1/8 of an inch. The inspector considered this amount dangerous in that an electrical malfunction in the control boxes could cause an arc or spark which could, in turn, put the dust into suspension and propagate an explosion.

P&M's electrical foreman and P&M'a director of safety training stated that the accumulations of coal dust were not as extensive as indicated by the inspector. They asserted that under normal operating conditions the accumulations would not be dangerous because electrical malfunctions in electrical control boxes are rare and electrical back-up systems in both boxes are designed to prevent arcs or sparks in the event of malfunctions.

The judge found that the accumulations existed in both boxes and in the amount described by the inspector. 6 FMSHRC at 1349. The judge also found that energized electrical facilities were present and that faults or failures in such facilities are common occurrences. Id. The judge concluded that the existence of accumulations in the presence of potential ignition sources established that the accumulations were "dangerous" within the meaning of the standard. Therefore, he concluded that a violation occurred. Id.

Substantial evidence supports the judge's findings concerning the presence of the accumulation. The inspector visually observed and measured the coal dust. P&M's witnesses did not dispute the presence of the coal dust. Rather, they argued that it was not as extensive as the inspector testified. The judge, who heard the witnesses and who had an opportunity to evaluate their testimony first hand, credited the inspect We find nothing in the record to warrant the reversal of the judge's findings in this regard. Mathies Coal Co., 6 FMSHRC 1, 5 (January 1984).

The inspector also testified that the circuit breakers on the boxes could short circuit and put the coal dust into suspension and thereby propagate an explosion. He further testified that any broken wire in the boxes could ignite the coal dust. MSHA's electrical specialist confirmed that faulty circuit breakers and defects in the wiring could create an ignition source. P&M's electrical foreman did not dispute that the components of the electrical boxes could become ignition source When asked if there could be an electrical failure in the main crusher box which could result in an ignition source, he replied, "Yes ... I guess [there] could." Moreover, he stated that he had twice seen circui breakers in a main breaker box explode. The foreman emphasized, however that such occurrences are not common. He stated that there was a back-u system to prevent electrical failures. He also stated that it would be "ver rare" for the circuit breakers to explode.

vicinity of an accumulation, the accumulation is dangerous within the meaning of the standard. 6 FMSHRC at 1349. We agree with the judge's conclusion. It is well established that the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. Federal Mine Safety and Health Review Commission, 606 F.2d 417, 419-20 (4th Cir. 1979); Old Ben Coal Co., 1 FMSHRC 1954, 1957-58 (December 1979). Section 77.202, like most coal mine safety standards, is aimed at the elimination of potential dangers before they become present dangers. Thus, we conclude that the judge did not err in seeking to determine whether, under the circumstances, an ignition could have occurred and that his finding of a violation is supported by substantial evidence.

Accordingly, the decision of the administrative law judge is affirmed. 1/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission.

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January 29,

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 85-15
HALFWAY, INCORPORATED	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

The issue in this civil penalty proceeding is whether a vio of a mine's roof control plan properly was found to be "signific substantial" within the meaning of the Federal Mine Safety and H Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). A citati issued by the Department of Labor's Mine Safety and Health Admin ("MSHA") pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C alleged that the mine operator, Halfway, Incorporated ("Halfway" 30 C.F.R. § 75.200 by failing to comply with the minimum require approved roof control plan. Halfway contested the inspector's a the jurisdiction of the Commission, an independent adjudicatory attached. Following a hearing on the merits, Commission Adminis Law Judge James A. Broderick affirmed the citation and aasessed penalty of $1,000. 7 FMSHRC 884 (June 1985)(ALJ). We granted H petition for discretionary review. For the following reasons, w the judge's decision.

Halfway operated the No. 1 Mine, an underground coal mine i in Raleigh County, West Virginia. The mine was a "hilltop" mine which entries are driven through the coal seam from the interio mountain towards the outcrop. 1/ As part of a regular mine insp

1/ The term "outcrop" is defined as "[the part of a rock form

advancing the entry, as required by the mine's approved roof control plan when mining within 150 feet of the outcrop. 2/ He was informed by Donald Hughes, Halfway's general mine foreman, that no supplemental support had been used.

After proceeding underground to inspect the area in question, the inspector observed that the entries had been driven at widths of 20 feet. Room No. 9 had been advanced for a distance of 150 feet beyond the point 150 feet from the outcrop. The last 20 feet of top in that room had deteriorated to such an extent that it had fallen. Similarly, Room No. 8 had been advanced 100 feet beyond the point 150 feet from the outcrop. The inspector also observed deterioration of the roof in that room. Roof bolting provided the sole means of roof support in these areas. At the time of his inspection, the inspector observed no miners in the particular rooms.

Because of these conditions, the inspector issued Halfway a citatio alleging a violation of 30 C.F.R. § 75.200. 3/ Pursuant to section 104(

2/ Safety Precaution No. 15 of Halfway's Minimum Roof-Control Plan provides:

> Roof bolts shall not be used as the sole means of roof support when underground workings approach and/or mining is being done within 150 feet of the outcrop or highwall. Supplemental support shall consist of at least one row of posts on 4-foot spacing, maintained up to the loading machine operator, limiting roadway widths to 16 feet. This does not apply to new openings being developed from the surface.

Ex. G-3 at 11.

3/ 30 C.F.R. § 75.200 provides:

[STATUTORY PROVISIONS]

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof

could contribute significantly and substantially
of a mine safety hazard. The inspector terminated the citation
Halfway abated the condition by dangering-off Room Nos. 8 and 9
agreed to use supplemental support in the remaining rooms as sp
in the roof control plan.

The judge found that Halfway violated 30 C.F.R. § 75.200 b
within 150 feet of the outcrop without the supplemental support
by its roof control plan. 7 FMSHRC at 885. He found the viola
be serious because roof conditions can deteriorate as mining op
approach the outcrop, and referred to the deterioration of the
Room Nos. 8 and 9 as evidence supporting his conclusion. Id.
stated, "A serious injury or fatality would have been reasonabl
had mining continued." 7 FMSHRC at 885-86. He determined that
violation was therefore of such nature as could significantly a
stantially contribute to the cause and effect of a mine safety
7 FMSHRC at 886.

A "significant and substantial" violation is described in
104(d)(1) of the Mine Act as a violation "of such nature as cou
cantly and substantially contribute to the cause and effect of
other mine safety or health hazard[.]" 30 U.S.C. § 814(d)(1).
Commission first interpreted this statutory language in Cement
National Gypsum Co., 3 FMSHRC 822 (April 1981):

> [A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, if based upon the particular facts surrounding the

Footnote 3 end.

> conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representa-

3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National G and stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted). Accord, Consolidation Coal Co., FMSHRC 34, 37 (January 1984). The Commission has explained further t the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining C 6 FMSHRC 1834, 1836 (August 1984).

On review, Halfway concedes a violation of its roof control plan but contests the finding that the violation was significant and sub- stantial. It argues that the violation did not contribute to a discr safety hazard and that no reasonable likelihood existed for an injury We disagree.

By mining the subject entries within 150 feet of the outcrop wit supplemental support and in widths in excess of 16 feet, Halfway viol its roof control plan and, hence, 30 C.F.R. § 75.200. There is ample record evidence to support the judge's finding that this conceded vio contributed to the discrete safety hazard of a roof fall. MSHA Inspe Ferguson testified that the mine had a massive roof structure, which diminished and deteriorated as mining approached the outcrop. He exp that near the outcrop roof conditions could change without warning, a that the deterioration created a danger of roof falls, which could oc suddenly. Clearly, the roof control provision requiring supplemental support within 150 feet of the outcrop was included in the roof contr plan in contemplation of those dangers. The inspector confirmed that the purpose of the supplemental support was to replace some of the ro support lost in driving 20-foot wide entries, by effectively limiting the width of the entries to 16 feet, and to serve as a visual indicat of potential roof movement. Tr. 38-39. This evidence provides subst support for the judge's findin that the failure to provide the requi

been discontinued.

This argument misconstrues the importance of the timing of issuance of a citation in the significant and substantial violat context. The fact that a miner may not be directly exposed to a hazard at the precise moment that an inspector issues a citation determinative of whether a reasonable likelihood for injury exis The operative time frame for making that determination must take account not only the pendency of the violative condition prior t citation, but also continued normal mining operations. National supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC (July 1984).

It is undisputed that Halfway's miners advanced Room Nos. 8 for distances of 100 feet and 150 feet, respectively, beyond the 150 feet from the outcrop without the supplemental support manda the mine's roof control plan. This was a major, not minor, depa from the roof control plan and, during that phase of active mini violation exposed miners to a roof fall hazard. The undisputed of MSHA Inspector Ferguson clearly supports this finding. The i testified that the roof near the face area in the cited rooms ha rated to the point that a roof fall was likely to occur. Tr. 41 70, 77. He also testified that roof bolts would not anchor and roof had fallen, exposing mud, dirt, and the roots of grass and Tr. 84-85. The testimony of Halfway's own witness supports the testimony. See, e.g., Tr. 106. This constitutes substantial ev supporting the conclusion that a reasonable likelihood for injur as the cited entries approached the outcrop.

We find further support for the conclusion that it was rea likely that the roof fall hazard contributed to by the violation result in injury had normal mining operations continued because Nos. 8 and 9 remained accessible until Halfway abated the citat dangering-off the entries. Tr. 44. 4/ Active mining was taking

4/ The evidence is conflicting as to whether Room No. 9 was da off at the time of the inspection. Compare Tr. 44 with Tr. 94. in finding that the violation "was abated by dangering off rooms 9," 7 FMSHRC at 885, the judge appears to have implicitly credi MSHA inspector's testimony and found that Room No. 9 had not be viously dangered-off.

exist in Room Nos. 8 and 9, a roof fall with resulting injury to a miner remained a reasonable possibility.

Finally, Halfway does not dispute on review that any actual injury from a roof fall would be reasonably serious in nature. Our decisions have stressed the fact that roof falls remain the leading cause of death in underground mines. See, e.g., Consolidation Coal Co., supra, 6 FMSHRC at 37-38 & n. 4.

Accordingly, we conclude that the violation in this case properly was found to be "significant and substantial" in that there was a reasonable likelihood that Halfway's noncompliance with the supplemental support requirements of its roof control plan could significantly and substantially contribute to the cause and effect of a roof fall hazard. The decision of the administrative law judge is affirmed. 5/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Chairman Ford assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision.

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January 30, 198

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RONNIE D. BEAVERS, et al.	:	Docket No. WEVA 85-73-D
v.	:	
KITT ENERGY CORPORATION,	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This inquiry has been conducted to determine whether Commission Administrative Law Judge Roy J. Maurer, the presiding judge in the above-captioned case, and Frederick W. Moncrief, counsel for the Secretary of Labor, engaged in prohibited ex parte communications in violation of Commission Procedural Rule 82, 29 C.F.R. § 2700.82. 1/

1/ Rule 82, entitled "Ex parte communications," provides:

(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.

(b) Procedure in case of violation. (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action a fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) All ex parte communications in violation of this

and received from Judge Maurer and Moncrief statements making a ful complete disclosure of the circumstances and content of the communi cations. In addition, the Commission severed this Rule 82 inquiry the merits of the case and stayed further proceedings before Judge Maurer.

The case on the merits involves a discrimination complaint fil January 9, 1985, by the Secretary of Labor on behalf of Ronnie D. B and twenty-seven other miners pursuant to the Federal Mine Safety a Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The complaint alleges that Kitt Energy Corporation ("Kitt Energy") laid off the c plainants because they lacked the underground safety and health tra specified in section 115 of the Mine Act, 30 U.S.C. § 825. The com also states that although Kitt Energy subsequently provided the tra and recalled the complainants to work, it refused to compensate the their training. The Secretary asserts that the layoff of the miner the refusal to compensate them after the recall violated section 10 of the Mine Act, 30 U.S.C. § 815(c)(1). Kitt Energy denied the all of illegal discrimination, and the United Mine Workers of America (intervened.

Frederick Moncrief represented the Secretary, Bronius Taoras r sented Kitt Energy, and Earl Pfeffer represented the UMWA. The css assigned first to Commission Administrative Law Judge James A. Broc On April 5, 1985, Judge Broderick issued a pre-hearing order direct counsel to file stipulations concerning those factual matters not i dispute and to specify witnesses and exhibits to be offered concern disputed factual issues. On April 25, 1985, after Judge Broderick' pre-hearing order was issued, but before the specified dates for co pliance with the order, the matter was reassigned to Judge Maurer.

Prior to the reassignment of the case, the Commission heard or argument in two cases posing the issue of whether an operator viol section 105(c)(1) of the Mine Act when it bypassed for rehire laid- individuals because they had not obtained relevant training referr in section 115 of the Act. UMWA on behalf of Rowe, et al. v. Peabo Co., etc., 7 FMSHRC 1357 (September 1985), pets. for review filed, 85-1714 & 85-1717 (D.C. Cir. October 29 & 30, 1985); Secretary on b of I.B. Acton, et al., etc. v. Jim Walter Resources, Inc., 7 FMSHR (September 1985), pets. for review filed, Nos. 86-1002 & 86-1027 (Cir. January 3 & 10, 1986). In these cases, the Commission conclu

but that if it recalled individuals who had obtained the training, it had to reimburse them for their training costs. In large part, the Commission rested its decisions on Secretary on behalf of Bennett, et a v. Emery Mining Corp., 5 FMSHRC 1391 (August 1983), pet. for review fil No. 83-2017 (10th Cir. August 17, 1983), in which the Commission held that although a mine operator may require that job applicants obtain requisite training prior to hire, it must reimburse newly hired miners who had obtained such training.

For the reasons that follow, we conclude that Judge Maurer and Moncrief did not engage in ex parte communications in violation of Rule 82. The stay is dissolved and the matter is returned to Judge Maurer for further proceedings on the merits.

Based upon the consistent and uncontested statements that Judge Maurer and Moncrief submitted to the Commission pursuant to this inquir and upon other aspects of the record in this matter, we find that the following events pertinent to this inquiry occurred following the reassignment of this case. On May 2, 1985, Moncrief telephoned Judge Maurer. Moncrief told the judge that he was calling on behalf of both himself and Kitt Energy's counsel, Mr. Taoras. Moncrief requested relief for the parties from the various filing requirements of Judge Broderick's previously issued pre-hearing order. Judge Maurer reminded Moncrief that the UMWA had intervened. Moncrief stated that he had contacted the UMWA's counsel, who had agreed with the Secretary and Kit Energy to seek relief from the pre-hearing order. As the basis for the request, Moncrief told Judge Maurer that he and Taoras had agreed that the case largely involved legal questions. He advised Judge Maurer tha the Peabody and Jim Walter cases, supra, had been argued before the Commission and that Emery, supra, was pending in the Tenth Circuit. Moncrief stated that these cases probably would be dispositive of the issues at hand. In response, Judge Maurer told Moncrief to submit a letter on behalf of the parties requesting the relief that they wanted. Judge Maurer also stated that if he were to conclude that Peabody and Jim Walter had a potentially decisive bearing on the issues of the case he would stay the matter but not past September 1985.

As the requested follow-up to the May 2 conversation, on May 8, 1985, Moncrief wrote to Judge Maurer. In the letter, Moncrief requeste relief from the pre-hearing order "on behalf of ..., Mr. Taoras, and myself." The letter asserted that the Peabody, Jim Walter, and Emery cases were likely to resolve the issues in Kitt Energy, or at least provide considerable guidance in their resolution. Accordingly, Moncri requested a continuance pending the Commission's decisions in Peabody and Jim Walter, but stated that he had advised the other counsel of

stipulate to the [illegible]. At the same time that Judge Maurer received the copy of the Taoras le Moncrief again telephoned the judge. Moncrief stated that he on behalf of all of the parties and that he was seeking a cont the scheduled October 9 hearing. Moncrief stated that the pre issuance of the Commission's decisions in Peabody and Jim Walt would obviate the need for an evidentiary hearing. Moncrief a that the parties were working on stipulations to submit to the Judge Maurer told Moncrief that he would continue the hearing and Taoras would agree to certain other conditions with respec hearings.

On October 2, 1985, Moncrief called Judge Maurer and infe that Taoras had agreed to the other conditions. Judge Maurer Moncrief to advise all of the parties that the judge would iss order continuing the hearing. Moncrief complied with this rec on October 3, 1985, wrote the judge a letter in which he "conf [the] telephone calls of October 1 and 2." Copies of the lett sent to counsel for Kitt Energy and the UMWA, and the letter w in the record. On October 4, 1985, the judge made an order co indefinitely the previously scheduled Morgantown hearing.

Commission Procedural Rule 82 (n. 1, supra) and section 5 the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(d) (1 prohibit ex parte communications between a Commission judge an regarding the merits of a pending case. UMWA on behalf of Ro v. Peabody Coal Co., etc., 7 FMSHRC 1136, 1142 (August 1985); on behalf of Clarke v. T.P. Mining, Inc., 7 FMSHRC 1010, 1014 1985); United States Steel Corp., 6 FMSHRC 1404, 1407-09 (Jun Knox County Stone Co., Inc., 3 FMSHRC 2478, 2482-86 (November The term, "ex parte communication," is defined in the APA as:

> an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding....

5 U.S.C. § 551(14) (1982). The three telephone conversations Judge Maurer and Moncrief were not ex parte communications wi meaning of our rule and the APA. The record reflects that re prior notice of the conversations was given to all of the par Moncrief asserts that when he spoke with Judge Maurer, "it wa diacussion with and by agreement of [Kitt Energy's] and [the counael." Judge Maurer's statement and the record confirm Mo assertion. We note also that Moncrief's letters memorializin conversations were placed or ma in the record and served

in originsl.) With respect to the telephone conversation of October 1, 1985, Judge Maurer states that Moncrief also informed him that he was calling on behalf of all of the parties. It is clear from the statements of Moncrief and Judge Maurer that Moncrief contacted Taoras and the UMWA's counsel regarding the substance of the May 2 and October 1 conversations prior to calling Judge Maurer. (The October 2 conversation was merely a follow-up to the October 1 conversation.) Moreover, copies of Moncrief's letters of May 8 and October 3, 1985, in which Moncrief indicated to the judge that counsel for the parties had been contacted previously concerning the subjects of the conversations, were sent to both counsel. Importantly, neither counsel for Kitt Energy nor counsel for the UMWA has disputed the contents of Moncrief's letters, nor have they objected to the contacts reflected in the letters. If Moncrief had not been speaking for all of the parties and with their prior notice when he contacted the judge, it is logical to assume that some objection from the other parties to the litigation would have been lodged.

Thus, we find that prior to the telephone conversations Moncrief advised the parties that he would converse with the judge, and we find further that the parties were aware of the subject matter that Moncrief would raise with the judge in those conversations. It is not impermissible for a party to contact a judge on behalf of all the parties concerning essentially procedural matters, where the conversation remains within the acope of the procedural subjects previously authorized by the parties to be raised with the judge. Because we find that Moncrief was acting with authorization on behalf of all parties and that "reasonable prior notice" had been given to other parties regarding the conversation we conclude that the conversations at issue were not "ex parte communications" within the meauing of Rule 82 and the APA.

Even were we to conclude that the communications were ex parte, we would not find them "prohibited ex parte communications." Rule 82 prohibits communications "with respect to the merits of any case." The conversations of Judge Maurer and Moncrief were procedural in nature and did not concern the merits of the Kitt Energy litigation. It is true, as the Commission has stated, that the concept of the "merits of a case" is to be construed broadly and, at the very least, includes discussion of issues in a case and how those issues should or will be resolved. Peabody Coal Co., supra, 7 FMSHRC at 1014; T.P. Mining, supra, 7 FMSHRC at 1143. For example, a judge may not suggest to counsel in an off-the-record, ex parte conversation that counael obtain a potential piece of evidence from opposing counsel. T.P. Mining, 7 FMSHRC at 1015-16. Nor may a judge solicit substsntive, off-the-record information from one counsel concerning the position a party has taken in other pending litigation when that position might influence the outcome of the case.

It is one thing to discuss the substance of the issues in it is quite another to advise a judge -- on behalf of all of t that decisions are forthcoming or already exist that may simpl procedural tasks of the judge and the litigants in the pending do the former is to influence the substance of the decision in case outside of the formal, public proceeding. See, e.g., Pat Federal Labor Relations Authority, 685 F.2d 547, 570 (D.C. Cir To do the latter is to facilitate the procedural process by wh decision is reached. The prohibition against ex parte communi was not intended to erect meaningless procedural barriers to e agency action. Patco, supra, 685 F.2d at 563-64.

Further, that portion of the conversation of October 1, 1 which Moncrief advised Judge Maurer that the parties were draf factual stipulations to submit to the judge was in the nature status report to the judge. This type of conversation is perm T.P. Mining, 7 FMSHRC at 1015. Similarly, the conversation of 2, 1985, in which Moncrief advised the judge that Taoras had a the other conditions that the judge wished to impose with resp future hearings and in which the judge asked Moncrief to advis parties that he was continuing the hearing also concerned the the case and did not violate Rule 82.

Thus, there is nothing in this record that in any way re discredit on the conduct of Judge Maurer or Moncrief. Indeed conducted themselves in an able and efficient manner. Their handling the litigation was procedurally proper and in accorda accepted standards. We therefore conclude that the referral Kennedy is without merit. 2/

2/ Because of the unusual manner in which this inquiry aros Commission directed Judge Kennedy to make a full and complete of the circumstances by which he became aware of the asserted communications. In doing so, Judge Kennedy also moved the Co strike certain portions of Judge Maurer's statement. Because resolution of this matter, we have determined that the questi the Moncrief letters were obtained need not be addressed furt present proceeding. Accordingly, the motion to strike is den

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford assumed office after this case had been considered at Commission decisional meeting and took no part in the decision.

Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

B.K. Taoras, Esquire
P.O. Box 500
Race Track Road
Meadow Lands, PA 15347

Earl R. Pfeffer, Esquire
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

Administrative Law Judge Roy J. Maurer
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

Administrative Law Judge Joseph Kennedy
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-165
	:	A.C. No. 15-12081-03530
v.	:	
	:	Docket No. KENT 85-197
B J D COAL COMPANY, INC., Respondent	:	A.C. No. 15-12081-03531
	:	
	:	No. E-1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Melick

These cases are before me upon petitions for assessme of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a joint motion to approve settlement agreements and t dismiss the cases. Respondent has agreed to pay the propos penalties of $2,140 in full. I have considered the repre- sentations and documentation submitted in these cases, and conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay penalties of $2,140 within 30 days of this order. No amount of these penalties shall be taken from nor detracted from the estate of the deceased Jimmy Dale Hamilton.

Gary Melick
Administrative Law Judge

Distribution:

W. F. Taylor, Esq., Office of the Solicitor, U.S. Departmen of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Timothy Crawford, Esq., Kelsey E. Friend Law Firm, 2nd Floo

January 6, 1986

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALT Docket No. K A. C. No. 15
v.	:	No. 4 Mine
MELANIE COAL COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

Based on an independent evaluation and de of the circumstances, I find CMI Richy D. Hamil Assessment Office did a specially commendable enforcement in this case and that unlike many c marginal proposals I receive this one is in ful the purposes and policy of the Act.

Accordingly, It is ORDERED that the motio settlement be, and hereby is, GRANTED. It is ORDERED that the operator pay the amount of the agreed upon, $3,692, in six equal installments January 15, 1986 and each month thereafter unt amount is paid on or before June 15, 1986. Fi ORDERED that subject to payment of the amount the captioned matter be DISMISSED.

Joseph B. Kenned
Administrative L

tment of Labor, 266 U. S. Courthouse, 501 Broadway,
ille, TN 37203 (Certified Mail)

A. Campbell, Esq., Weinberg & Campbell, Perkins
ing, P. O. Box 727, Hindman, NY 41822 (Certified Mail)

TENNIS MAYNARD, Complainant	:	DISCRIMINATION PROCEEDI
v.	:	Docket No. KENT 84-231-
BLOCK COAL COMPANY, Respondent	:	MSHA Case No. Pike CD 8

DECISION

Appearances: Hugh M. Richards, Esq., Prestonsburg, Kentu
for Complainant;
Thomas J. Blaha, Esq., Paintsville, Kentuck
for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission u
§ 105(c) of the Federal Mine Safety and Health Act of 197
30 U.S.C. § 815(c) [hereinafter referred to as the Act] c
August 23, 1984 alleging that he was "not able to take ti
off with a paid vacation" in violation of company policy.
further alleged that he was harassed on and off the job (
sumably by the Respondent) as a result of filing an earli
discrimination complaint against Block Coal Company. Thi
"harassment" allegedly has caused him severe mental angui
and requires medical treatment. By his complaint, he sou
removal of all reprimands and personnel actions from his
personnel file and vacation with pay. At the hearing, th
request for relief was expanded to include reinstatement
his former job at some future time when he becomes medica
able to return to work, three hours of pay at time and a
(for which he had been docked) and that he be allowed to
the medical insurance he had prior to leaving the job.

This is the second Complaint of Discrimination file
with the Commission by Mr. Maynard against essentially th
same Respondent. The earlier case is styled Secretary of
Labor, Mine Safety and Health Administration (MSHA), on
behalf of Tennis Maynard, Jr. v. Diamond P. Coal Company,
Inc., (Docket No. KENT 82-199-D). Exhibit No. C-1 herein
the settlement agreement filed in that case and is signed
Mr. Paul Pelphrey for both Diamond P. and Block Coal

burg, Kentucky on August 28 and 29, 1985. Tennis Maynard, Jr., Elbie Pickelsimer and Joe Cook testified on behalf of the Complainant; Paul Pelphrey and Dennis Marshall testified on behalf of Respondent.

I have carefully considered the entire record and the contentions of the parties, and make the following decision.

DISCUSSION AND FINDINGS

Tennis Maynard, Jr. [hereinafter Complainant] had been employed as a rock truck driver by Mr. Pelphrey in the surface coal mining business under various company names; Diamond P. and Block Coal among them, and at various locations in Eastern Kentucky. His former job with Diamond P. terminated with his firing on May 17, 1982 because he refuse to work in an allegedly unsafe condition. As a consequence of this firing, he filed a Complaint of Discrimination, whic was later settled prior to hearing and resulted in his reinstatement. His last job was in Morgan County, Kentucky on Route 650, where Dennis Marshall was again his supervisor on the second shift.[1] This was the job he was reinstated in as of October, 1983 as a result of the settlement of his previous discrimination complaint, supra. He remained in this job until he quit on June 14, 1984.

After Complainant's return to work in October of 1983, he felt that there were several incidents which occurred at work which interfered with his job and amounted to "discrimination".

Among them was one case where he had backed his rock truck up a ramp into a four foot wide hole which almost caused the truck to turn over. He was not warned of the hol in time by the man "running field". Another time there was tree improperly loaded on another truck, which broke the windshield of Complainant's truck while passing at night. I specifically find that these two incidents were serious and posed a grave danger to Complainant. However, Complainant

---

[1]The second shift was a ten hour shift from six (6) in the evening until four (4) in the morning, with frequent overtim

relative position as Complainant with management.

Complainant also was docked three (3) hours of pay one night because he had parked his truck and wa working due to problems with the truck's headlights. supervisor explained that the Complainant had failed tact him concerning any difficulty with the truck an after one of the other men had told him that Maynard sitting out there did he go out to investigate. He "reared back in the seat," appearing to be asleep. docked three (3) hours pay because he didn't contact foreman to either have his truck repaired or to use truck which was available on the site that night. M Marshall's explanation of the Company's action in th is credible and I so find.

With regard to malfunctioning equipment genera somewhat related claim is made by Complainant that h visor provided him with inferior equipment in compar the other rock truck drivers. It is not disputed th trucks were assigned on a seniority basis, with the desirable trucks going to the most senior men. Comp however, feels that he should have been assigned a truck earlier in his employment at the Morgan County For purposes of this discrimination case and withou which particular truck Complainant should have been on any particular day, the important issue is safet job. It is unrefuted in the record that the compan that any truck driver having any problem with his t report it to the foreman immediately and that he is required to operate an unsafe vehicle. In several the record, Complainant states he did operate an un vehicle but he does not state that he was required or that he could not have reported the vehicle's co management. In fact Mr. Marshall testified that Co didn't report problems with the vehicles as often a did.

Complainant further complains that on at leas occasion, he was made to work harder than the other truck drivers. No allegations of a derogation in j are made. The Respondent of course contests this a that the foreman involved in this instance only wan Complainant to put in a day's work for a day's pay. this issue unnecessary to resolve as even if it is

entitlement to one week's vacation pay prior to his departure from the Company, there is a definite split of opinion between the parties. Complainant is aware that you have to be on the job one year in order to get one week's paid vacation, but he states he was going into his third year of employment by senority and had never had a paid vacation.

The settlement agreement which the parties signed to reinstate Complainant in 1983 (Exhibit No. C-1) states inter alia that: "Respondent shall pay Maynard back wages in the lump sum amount of Ten Thousand ($10,000.00) Dollars, less deductions, required by law." Block Coal Company's position on this issue, through Mr. Pelphrey, is that Complainant was paid two weeks vacation as part of the $10,000 settlement. Therefore he would have to finish a full year's work after reinstatement in order to be entitled to another week of paid vacation. I note, however, that the settlement agreement itself does not mention vacation pay. Nor does the Decision Approving Settlement. The only evidence in the record concerning this issue comes from Mr. Pelphrey, who with his counsel, personally negotiated the settlement with a Mr. Grooms, the Department of Labor attorney who was representing Complainant at the time. Since only Pelphrey, his lawyer, and Grooms were privy to these settlement negotiations, if the situation was other than as Mr. Pelphrey has testified, it was incumbent upon Complainant to produce that testimony from Grooms. Therefore, by a simple preponderance of the relevant, probative and credible evidence I find that the $10,000 settlement paid the Complainant up through the time of his reinstatement, including two weeks of paid vacation that he had accumulated in the interim less $2,000 and some odd dollars that he earned in other jobs during the time period he was off work.

By early 1984, Complainant was having medical problems with his stomach and nerves and was subsequently given Tagamet and Mylanta for his stomach, Sinequan to help him sleep at night, which was later changed to Amitriplyline, and Chlorpromazine. Complainant traces these medical problems to "harassment and discrimination" that he was going through on the job. Towards the end of his employment with Block Coal Company, he became worried about his safety and the safety of the men that worked with him because he couldn't keep his mind on his job. On June 14, 1984, Complainant filed the instant discrimination complaint with MSHA and quit his job with Block Coal Co p the ice of his personal

features unrelated to working conditions or occupati
cause. The doctor realized that Complainant feels v
strongly that his medical problems were brought abou
work, more specifically, his problems at work, but h
doctor) feels he is having misperceptions about the
of his illness, is probably paranoid and may even be
delusional.

As of the date of the hearing in August of 198
plainant was himself still of the opinion that he co
return to work at that time, because of his emotiona
illness, and in fact, doesn't know if he ever will b
enough to work again.

ISSUES

1. Whether Complainant has established that he was
in activity protected by the Act.

2. If so, whether Complainant suffered adverse act
result of the protected activity.

3. If so, to what relief is he entitled.

CONCLUSIONS OF LAW

Complainant and Respondent are protected by a
to the provisions of the Act, Complainant as a mine
Respondent as the operator of a mine.

In order to establish a prima facie case of d
tion under the Act, the miner has the burden of sho
that he engaged in protected activity and (2) that
subject to adverse action which was motivated in an
the protected activity. Secretary/Pasula v. Consol
Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grou
nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1
Cir. 1981); Secretary/Robinette v. United Castle Co
FMSHRC 803 (1981); Secretary/Jenkins v. Hecla-Day M
Corporation, 6 FMSHRC 1842 (1984). The mine operat
rebut the prima facie case by showing that no prote
activity occurred or that the adverse action was no
vated in any part by the protected activity.

ny protected activity on his part. There is no evi-
of any protected work refusals or retaliations for such
ty nor is there any evidence that Mr. Maynard made any
complaints to MSHA or to any state or local mining
ities during this time period.

I do conclude, however, that when Complainant filed the
mplaints of Discrimination which he has filed against
d P. and Block Coal Companies, he was engaged in
ty protected under the Act. Further, I conclude that
se occasions during the eight (8) month period of his
atement with Block Coal, when Complainant reported
nts, incidents involving safety and safety-related
ms with the equipment he was using to management
nel, he was engaged in activity protected under the
Having found Complainant engaged in activity protected
Act, the critical issue in this case is whether Mr.
d's termination of his employment was in any way
ed by his engaging in protected activity under section
of the Act, or whether it resulted from his inability
dle his job because of emotional or mental illness.
there is some argument by counsel as to the proper
terization of Complainant's June 14, 1984 departure, I
hat Complainant quit his job because of his emotional
s which is diagnosed as a major depression with
id features, not because of any discriminatory action
part of the mine ownership or management.

The only adverse action therefore that I find in this
s the docking of Complainant's pay for three (3) hours.
ucial question here then is whether the evidence
ishes that the adverse action was motivated in any part
protected activity. I conclude for the reasons stated
r in this decision under Discussion and Findings that
not.

Whether the Respondent treated the Complainant unfairly
igning him to drive older equipment vice newer and
equipment or making him work harder than other truck
s; or whether it sufficiently considered his emotional
ms are not issues properly before me in this case. My
iction is limited to considering whether the Respondent
minated against the Complainant for activity protected
the Federal Mine Safety and Health Act of 1977. I
de that the evidence before me establishes that it did

mony adduced in this case, I conclude and find that
Complainant here has failed to establish a prima fac
of discrimination on the part of the Respondent. Ac
ingly, the Complaint IS DISMISSED, and the Complaina
claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Jud

Distribution:

Mr. Tennis Maynard, Jr., Rt. 264, Box 670, Davella,
(Certified Mail)

Hugh Richards, Esq., 715 North Lake Drive, Prestonsb
41653 (Certified Mail)

Thomas J. Blaha, Esq., J. Scott Preston Law Offices
Second Street, P.O. Box 1361, Paintsville, KY 4124(
(Certified Mail)

rbg

ECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 85-97
Petitioner	:	A.C. No. 15-13881-03554
v.	:	
	:	Pyro No. 9 Slope
YRO MINING COMPANY,	:	William Station
Respondent	:	

DECISION

ppearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

efore: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of he Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks civil penalty assessments against he respondent for two alleged violations of certain mandatory afety standards set forth in Part 75, Title 30, Code of ederal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in vansville, Indiana, on December 3, 1985.

Issues

The issues presented in this case are (1) whether the onditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and (2) the ppropriate civil penalty to be assessed for the violations, aking into account the statutory civil penalty criteria found n section 110(i) of the Act.

the condition or practice is stated as follows:

> A violation was observed on the No. 3 uni I.D. 003 in that the quantity of air going through the last open crosscut was less than 9000 CFM as required by the approved ventilati methane and dust-control plan. When measured with an approved anemometer there was only 5710 CFM going through the last open crosscut.

Section 104(a) "S&S" Citation No. 2506565, iss January 28, 1985, cites a violation of 30 C.F.R. § the condition or practice is stated as follows: "A tion of loose coal was present under the bottom bel rollers along the No. 1 belt conveyor entry startin tail feeder and extending outby for a distance of a 20 feet."

This case is one of five cases heard in Evansv Indiana, on December 3, 1985. When this case was c trial, the parties advised me that the respondent a the violations, and sought leave to dispose of the tendering full payment of the proposed civil penalt by the petitioner for the two violations in questic

Respondent's representative confirmed that the no longer contests the violations, and he agreed th dent would tender the full amount of the proposed c alties. He also agreed to the negligence and gravi made by the inspector in support of the citations case.

The parties stipulated that at all times relev case, the overall coal production for the responde company was 5,020,840 tons, and that the productio Pyro No. 9 William Station Mine was 2,041,542 tons

The parties stipulated that the payment of th civil penalties will not adversely affect the resp ability to continue in business.

The parties stipulated that the violations we abated in good faith by the respondent. I take no

The respondent's request to withdraw its contest and to pay the proposed civil penalties was granted from the bench, and I considered the proposed disposition of this case as a settlement proposal pursuant to Commission Rule 30, 29 C.F.R. § 2700.30. Further, after consideration of the pleadings, stipulations, and arguments made on the record by the parties in support of the proposed mutually agreed upon disposition of the case, I rendered a bench decision approving the proposed disposition, and this decision is reaffirmed and reduced to writing herein pursuant to Commission Rule 65, 29 C.F.R. § 2700.65.

Conclusion

In view of the foregoing, the citations issued in this case ARE AFFIRMED. Further, after careful consideration of the information submitted by the parties with respect to the six statutory civil penalty criteria found in section 110(i) of the Act, I conclude and find that the proposed settlement disposition advanced by the parties is reasonable and in the public interest, and IT IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $206 in full satisfaction of Citation No. 2505478, January 7, 1985, 30 C.F.R. § 301, and a civil penalty in the amount of $112 for Citation No. 2506565, January 28, 1985, 30 C.F.R. § 75.400. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and ord and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Depart of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Bruce Hill, Director of Safety and Training, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42458 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-182 A.C. No. 15-13881-03569
v.	:	
PYRO MINING COMPANY, Respondent	:	Pyro No. 9 Slope William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Soli
U.S. Department of Labor, Nashville, Tenne
for the Petitioner;
Bruce Hill, Director of Safety and Trainin
Pyro Mining Company, Sturgis, Kentucky, fo
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the
tioner against the respondent pursuant to section 110(a)
the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
§ 820(a). Petitioner seeks a civil penalty assessment in
amount of $241 against the respondent for an alleged viol
of mandatory health standard 30 C.F.R. § 70.501. The res
dent filed a timely answer contesting the alleged violat
and a hearing was convened in Evansville, Indiana, on Dec
1985.

Issues

The issues presented in this case are (1) whether t
conditions or practices cited by the inspector constitut
violation of the cited mandatory health standard, and (2
appropriate civil penalty to be assessed for the violati
taking into account the statutory civil penalty criteria
in section 110(i) of the Act.

noise survey conducted by MSHA on 5-30-85, the noise exposure exceeds the allowable dose percentage of 132%. The noise exposure in the working environment of the continuous miner operator (occupation code 036) on Number 4 unit MMU No. 0040 is 133.5%.

The operator shall take corrective actions to reduce the noise level to within the allowable limit of 132%. A hearing conservation plan as required by section 70.501 shall be submitted to MSHA within 60 days of this citation dated 6-4-85. Joy Miner 14 CM-5 Co. SN. M 004. No. 4 Unit located in the 1st west entries off the 5th north.

This case is one of five cases heard in Evansville, iana, on December 3, 1985. When this case was called for al, the parties advised me that they reached a proposed tlement of the controversy, the terms of which included agreement by the respondent to pay a civil penalty assess- t in the amount of $50 for the violation in question.

The respondent's representative agreed that the violation urred as stated in the citation, and he also agreed to the igence finding made by the inspector in support of his ation.

The parties stipulated that at all times relevant to this e, the overall coal production for the respondent operating pany was 5,020,840 tons, and that the production for the o No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed l penalty will not adversely affect the respondent's ability continue in business. They also stipulated that the violan was abated in good faith by the respondent.

dosimeter used by the inspector [illegible] exposure for the continuous miner operator's working e ment. Under the circumstances, counsel asserted that gravity of the violation is not as great as originally mined by the inspector.

I take note of the fact that in its answer to the civil penalty proposal filed by the petitioner, the re took issue with the inspector's "significant and subst (S&S) finding in view of the marginal dosimeter readir 133.5 percent. The allowable noise exposure limit for tested occupation in question is 132 percent. I also note of the fact that compliance was achieved and the level exposure was reduced to within the allowable lir 132 percent after the respondent replaced a worn part replaced a chain on the continuous-mining machine oper the affected miner in question. Under the circumstanc cannot conclude that the inspector's original gravity indicating a permanently disabling possible hearing l supportable.

Conclusion

After careful consideration of the pleadings, st and arguments advanced by the parties on the record i of the proposed settlement disposition of this case, the citation and approved the proposed settlement in decision made pursuant to 29 C.F.R. § 2700.30. That is reaffirmed and reduced to writing pursuant to 29 C § 2700.65. I conclude and find that the settlement d is reasonable and in the public interest.

ORDER

The respondent IS ORDERED to pay a civil penalty amount of $50 for the violation in question, and paym to be made to the petitioner within thirty (30) days date of this decision and order. Upon receipt of pay this proceeding is dismissed.

George A. Koutras
Administrative Law Judg

A. Grooms, Esq., Office of the Solicitor, U.S. Department
r, 280 U.S. Courthouse, 801 Broadway, Nashville, TN
Certified Mail)

ce Hill, Director of Safety and Training, Pyro Mining
P.O. Box 267, Sturgis, KY 42458 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 85-33 A.C. No. 44-05831-03524
v.	:	Mine No. 47
SUTHERLAND COAL COMPANY, Respondent	:	

ORDER APPROVING SETTLEMENT

Before: Judge Broderick

On December 24, 1985, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The two violations involved were originally assessed at $3450, and the parties propose to settle for the amount assessed with a provision for extended payment of the assessment.

The violations were very serious, having resulted in or contributed to the fatal injury of a mine foreman, who was the son of the mine owner. The motion states that the fatal accident resulted from the operator's reckless disrega for safety. Respondent was a small operator, with a limited history of prior violations. The mine was closed following the accident and has not reopened. Respondent states that it can only pay the penalty in installments, and the Secreta has agreed to this.

I conclude that the settlement agreement should be appr

Therefore, IT IS ORDERED that the settlement is APPROVE It is further ordered that Respondent shall pay the sum of $3450 for the violations alleged. Payment shall be made as follows:

> Respondent shall pay the sum of $143.75 on or before February 1, 1986, and a like sum on the first day of each month thereafter until the total amount is paid.

ified Mail)

t R. Sutherland, Sutherland Coal Company, P.O. Box 41,
field, VA 24220 (Certified Mail)

JAN 1 1986

DONALD C. BEATTY, JR., Complainant	:	DISCRIMINATION PROCE
	:	Docket No. PENN 84-
v.	:	Lucerne No. 8 Mine
HELVETIA COAL COMPANY, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C., Complainant; William M. Darr, Esq., Indi Pennsylvania, for Respondent.

Before: Judge Broderick

I issued a decision on the merits in this case on October 22, 1985 (corrected October 24, 1985). In tha decision, I found that Complainant established that he been discriminated against by Respondent in violation section 105(c) of the Federal Mine Safety and Health A of 1977 (Act). As part of the relief, I ordered Respo to pay the costs and expenses (including attorney's fe reasonably incurred by Complainant in connection with institution and prosecution of this proceeding. I dir counsel to confer and attempt to agree on the amount c Complainant as costs and expenses.

Complainant has submitted a statement of attorney fees in the total amount of $6230. Of this amount, $4 is claimed for Earl R. Pfeffer, Esq., $60 is claimed Mary Lu Jordan, Esq., and $1920 is claimed for the Un Mine Workers of America (UMWA), by whom Pfeffer and J are employed. $441.12 is claimed by the UMWA for the travel expenses. Respondent does not object to these

Complainant has also filed a claim in the total of $495.72 for "briefing" of Donald Beatty, Tom Grove Robert Schork on May 14, 1985, and their appearance a hearing May 15, 1985. Beatty is the Complainant. Gr Schork testified on his behalf. The Local Union appa paid them $167.12, $165.99, and $162.61 respectively. is no explanation of the amounts claimed. I will all bursement of the statutory witness fees for the three

To Earl R. Pfeffer, Esq.,	$4250.00
To Mary Lu Jordan, Esq.	60.00
To UMWA	2361.12
To Local 3548, UMWA	90.00

James A. Broderick
James A. Broderick
Administrative Law Judge

ution:

Pfeffer, Esq., Mary Lu Jordan, Legal Asst., UMWA,
h St., N.W., Washington, D.C. 20005 (Certified Mail)

M. Darr, Esq., Helvetia Coal Company, 655 Church St.,
, PA 15701 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. HOPE 79-323-P
	:	A.C. No. 46-05121-03008F
v.	:	Wayne Mine
MONTEREY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of a settlement to dismiss this proceeding, upon the following grounds:

1. On May 8, 1978, Section 107(a) imminent danger Withdrawal Order No. 25842 was issued to Monterey at its Wayne Mine for three alleged violations of the mandatory safety standards which are the subject of the present civil penalty proceeding.

2. The violations were issued as a result of a fatal shaft sinking accident which occurred at the mine on May 5, 1978.

3. At the time the accident occurred, the intake air shaft at the Wayne Mine was being constructed by Frontier-Kemper Constructors ("Frontier-Kemper"), an independent contractor employed by Monterey for the purpose of conducti the shaft sinking operations.

4. While the shaft sinking operations at the Wayne Mine were under the direct supervision and control of Frontier-Kemper, MSHA enforcement policy on May 8, 1978, wa to cite the mine owner-operator for all violations which occurred on mine property. Therefore, Withdrawal Order No. 25842 was issued to Monterey instead of Frontier-Kemper whi was actually conducting the operations which resulted in th three violations at issue.

On December 13, 1985, the Secretary filed a civil proceeding with this Commission against Frontier-Kemper, No. WEVA 86-76, for the same three violations at in this proceeding. It is now the intention of the ary to proceed solely against Frontier-Kemper as the or responsible for the violations at issue.

Therefore, the following settlement has been to by the parties:

a. The Secretary will modify Order No. 28542 to elete Monterey as the cited operator; and

b. The Secretary will and hereby does move to ismiss this civil penalty proceeding against Monterey thout penalty assessment.

conclude that the settlement should be approved.

ORDER

HEREFORE IT IS ORDERED that:

. The motion for approval of settlement is GRANTED.

. The hearing set for January 9, 1986, is CANCELLED.

. This proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

bution:

C. Means, Esq., Crowell & Moring, 1100 Connecticut , N.W., Washington, D.C. 20036 (Certified Mail)

m A. Howe, Esq., Richard A. Steyer, Esq., Loomis, Fellman & Howe, 2020 K Street, N.W., Washington, D.C. (Certified Mail)

A. Cohen, Esq., U.S. Department of Labor, Office of licitor, 4 15 Wilson 1 d., Suite 400, Arlington, VA

ROCCO CURCIO, Complainant	:	DISCRIMINATION PROCE
	:	Docket No. PENN 84-2
v.	:	Emilie No. 1 Mine
KEYSTONE COAL MINING CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C., Complainant; William M. Darr, Esq., Indi Pennsylvania, for Respondent.

Before: Judge Broderick

I issued a decision on the merits in this proceed September 27, 1985. In that decision I found that Com established that he had been discriminated against by in violation of section 105(c) of the Federal Mine Saf Health Act of 1977 (Act). As part of the relief, I or Respondent to pay the costs and expenses (including at fees) reasonably incurred by Complainant in connection the institution and prosecution of this proceeding. I counsel to confer and attempt to agree on the amount c Complainant as costs and expenses. Complainant has su a statement of attorneys fees in the total amount of $ Of this amount $3671.87 is claimed for Earl R. Pfeffe $120. is claimed for Mary Lu Jordan, Esq., and $1615.6 claimed for the United Mine Workers of America (UMWA) whom Pfeffer and Jordan are employed. In addition, th claims $370.65 for the cost of the attorney's hotel, and transportation expenses and for the transcript of Respondent does not object to these amounts.

Complainant also has filed a claim in the amount $294.72 for expenses incurred by Local 1412, UMWA in with this proceeding. Respondent objects to this cla

Section 105(c)(3) of the Act provides that all c and expenses determined to have been reasonably incur connection with the institution and prosecution of th proceeding shall be assessed against the person found

prior to the hearing herein. The amount is apparently
on Complainants hourly rate of pay (12.50). There is
ving or claim that he actually lost time or wages
esult of the meeting. Therefore, it is not shown to
expense reasonably incurred in this proceeding, and I
the claim. However, I will allow the claim for mileage
rking on that day in the total amount of $17.00. The
Union also apparently paid claimant $106.78 for his
ance at the hearing on December 13, 1984 (8 hours at
3 per hour. The discrepancy in the hourly rate is not
ned). Again, there is no showing or claim that he
ly lost wages in the amount claimed and I reject the
The Local Union claims $115.32 for witness Jerry Duncan
stified at the hearing (8 hours at $14.415 per hour). The
able expense for a witness at a hearing is the witness
xed by 28 U.S.C. § 1821, and I will allow reimbursement
e statutory witness fee ($30 per day) and the mileage
rking expenses ($17.00). Claimant seeks reimbursement
Local Union for a one half hour meeting of Jerry Duncan
n Bonelli with MSHA on July 23, 1984 in the total amount
.62. The complaint was filed with the Commission on
30, 1984. The expense is not explained and cannot
d to have been incurred in connection with the present
ding. It is denied.

herefore, IT IS ORDERED that Respondent shall pay the
ing costs and expenses in satisfaction of paragraph 3
Relief in my decision issued September 27, 1985:

.	To Earl R. Pfeffer, Esq.	$3,671.87
.	To Mary Lu Jordan, Esq.	120.00
.	To UMWA	2,086.27
.	To Local 1412, UMWA	64.00

James A. Broderick
James A. Broderick
Administrative Law Judge

bution:

. Pfeffer, Esq., Mary Lu Jordan, Legal Asst., UMWA, 900
t., N.W., Washington, D.C. 20005 (Certified Mail)

m M. Darr, Esq., Keystone Mining Corp., 655 Church St.,

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI Docket No. KENT 85-124 A.C. No. 15-00590-0352
v.	:	No. 1 Mine
DIXIE FUEL COMPANY, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Soli U.S. Department of Labor, Nashville, Tenne for Petitioner; William A. Rice, Esq., Har Kentucky, for Respondent.

Before: Judge Broderick

The above case was called for hearing pursuant to n on December 17, 1985 in Pineville, Kentucky. At the ope the hearing, counsel made a motion on the record for the approval of a settlement agreement reached by the partie

The case involves two citations, one for an alleged violation of the ventilation standard, originally assess $400.00, the other for an alleged violation of the roof plan originally assessed at $10,000.00. The agreement p to settle for payment of $400.00 and $7500.00 for the violations.

The operator operates two mines which in 1983 produ 223,504 tons of coal and in 1984 242,784 tons. There w prior violations of 30 C.F.R. § 75.316, and 27 prior vi of 30 C.F.R. § 75.200.

The ventilation violation alleged that the air had below the required 9000 cubic feet per minute at the la crosscut. Less than one tenth of one percent methane w present. Because the operator could not determine the for the air loss after diligent effort, the area was ab

The roof control violation was extremely serious. resulted in one fatal injury, and 3 other nonfatal inju

all in May, 1983. The mine in question has been closed, been operated for only two weeks in 1985.

s part of the settlement agreement, Respondent has agreed e available to all miners in its two mines a copy of the ed roof control plan. It has further agreed that all the up to and including section foremen will attend a g class in roof control to be conducted by MSHA at its , Kentucky office. The class will be held on company that is, the miners will be paid at their regular rates for attending the class.

have carefully considered the settlement agreement in ht of the criteria in section 110(i) of the Act, and de that it should be approved.

herefore, IT IS ORDERED that the settlement agreement ed on the record December 17, 1985 is APPROVED;

T IS FURTHER ORDERED that Respondent shall make available h of its miner-employees a copy of the current approved ontrol plan.

T IS FURTHER ORDERED that all of Respondent's employees, up to and including section foremen, shall a roof control class at the MSHA office in Harlan, ky and they shall be paid by Respondent at their regular of pay. This class shall be held on or before February 7,

T IS FURTHER ORDERED that Respondent shall pay the sum of 00 within 30 days after the roof control class referred ve is held, and subject to the payment and the other ions set out above being fulfilled, this proceeding is SED.

James A. Broderick

James A. Broderick
Administrative Law Judge

William A. Rice, Esq., Rice, Huff & Henderickson, 417 East Mound Street, Harlan, KY 40831 (Certified Mail)

slk

JAN 14 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-163
	:	A.C. No. 15-03161-03558
v.	:	
	:	Star North Underground
PEABODY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitio against the respondent pursuant to section 110(a) of the Fede Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeki civil penalty assessments in the amount of $6,000 for two al violations of certain mandatory safety standards found in Pa Title 30, Code of Federal Regulations. The respondent conte the alleged violations and the case was docketed for a heari on the merits. The hearing was subsequently continued after parties advised me of a proposed settlement of the violation

By joint motion filed with me on January 6, 1986, pursu to Commission Rule 30, 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement of the case, the terms of which require the respondent to pay civil penalties in the amount of $4,000 for the disputed violations.

Discussion

In support of the proposed settlement, the parties stat that they have discussed the alleged violations and the stat criteria stated in section 110 of the Act. They have also s mitted information concerning the civil penalty criteria and full disclosure of the circumstances connected with the issu of the violations.

report, which is a part of the record, chief maintenance
James W. Warner was fatality injured when he became enta
between a belt conveyor and belt roller. According to t
the accident victim had apparently removed a portion of
conveyor guard without deenergizing the belt. Citation
2506470, January 15, 1985, cites a violation of 30 C.F.R
§ 75.400(c) for a failure to adequately guard the belt c
drive, and Citation No. 2506471, January 15, 1985, cites
lation of 30 C.F.R. § 77.404(c), for the failure of the
victim to deenergize the power from the beltline before
maintenance or repairs on the belt.

In support of the proposed settlement, petitioner s
that the accident victim was grossly negligent in attemp
to repair or perform maintenance on the belt when he rem
portion of the belt guarding and failed to deenergize th
belt. Based on a review of the available evidence, incl
the information contained in the accident report, and ci
Old Dominion Power Company, 6 FMSHRC 1886, 1895-96 (1984
Nacco Mining Company, 3 FMSHRC 848 (1981), petitioner be
that this gross negligence should not be attributed to t
respondent.

Petitioner asserts that the accident victim did not
others by his negligent acts, and there is no evidence t
respondent could have reasonably foreseen that he would
such a manner on the date the violations occurred. Peti
points out that the accident victim was chief maintenanc
foreman at the mine with over 7 years experience at his
tion, had 14 years total mining experience, and had rece
annual retraining on October 26, 1984.

Conclusion

After careful review and consideration of the plead
arguments, and submissions in support of the motion to a
the proposed settlement of this case, I conclude and fir
the proposed settlement disposition is reasonable and in
public interest. Accordingly, pursuant to 29 C.F.R. § 2
the motion IS GRANTED, and the settlement IS APPROVED.

nt of $2,000 in satisfaction of Citation No. 2506470, and
00 for Citation No. 2506471. Payment is to be made to MSHA
in thirty (30) days of the date of this decision. Upon
ipt of payment this matter is dismissed.

George A. Koutras
Administrative Law Judge

ribution:

as A. Grooms, Esq., Office of the Solicitor, U.S. Department
nbor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN
3 (Certified Mail)

ael A. Kafoury, Esq., Peabody Coal Company, P.O. Box 373,
Louis, MO 63166 (Certified Mail)

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 85-81-M
Petitioner	:	A.C. No. 47-0095-05502
	:	
v.	:	Mackville Quarry
	:	
LANDWEHR MATERIALS, INC.,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solici U.S. Department of Labor, Chicago, Illinois, Petitioner; Thomas J.Landwehr, General Manage Landwehr Materials, Inc., Appleton, Wisconsin for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. § 56.5-50(b). Pursuant to notice, t case was heard in Green Bay, Wisconsin on December 10, 1985 Arnie Mattson, a Federal mine inspector, testified on behal Petitioner. No witnesses were called by Respondent. The parties waived their right to file written post-hearing bri but both made arguments on the record at the close of the hearing. I have considered the entire record, and the contentions of the parties, and make the following decision

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of a limestone quarry Outagamie County, Wisconsin, known as the Mackville Quarry Mill.

2. The subject mine is open about 9 months of the ye and works about 38,000 to 40,000 production hours annually. About 20 employees work at the mine.

required the miners to wear hearing protection. In March, 1984, a noise sampling survey was conducted. It showed that certain employees were exposed to noise in excess of the prescribed limits. Citations were not issued, because the employees were wearing approved hearing protection.

4. Between October 17, 1982 and October 16, 1984, Respondent had a history of one paid violation of a mandatory health or safety standard.

5. Respondent has always cooperated with the MSHA inspectors in their inspections of its facilities.

6. On October 16 and 17, 1984, Federal Mine Inspector Arnie Mattson conducted a health and safety inspection of Respondent's mine. The inspection included a sound level examination of the environment of a shovel operator. The inspector determined that the shovel operator was exposed to dHA for an 8 hour day. The operator was wearing personal hearing protection. A citation was issued because the Inspector determined that feasible engineering controls were not being utilized.

7. Following a discussion between Respondent and the Inspector, the MSHA Technical Support Unit in Denver, Colorac performed a noise control examination in April and May, 1985. The citation termination date was extended because of this examination.

8. A vinyl barrier curtain was installed between the shovel operator and the engine compartment of the shovel. Tests performed by MSHA's Industrial Hygienist showed that tl noise level was reduced in the shovel operator's environment almost 4 dBA (from an average of 101 dBA to an average of 98 dBA). This was a reduction in terms of the percentage of the permissible noise levels of approximately 33 percent (101 dB is 459 percent of the allowable level; 98 dBA is 303 percent The reduction, though significant, did not reduce the noise permissible levels (90 dBA), so personal protection equipment was still deemed necessary.

9. The report from the Denver technical center indica that the ear muffs worn by the shovel operator did not afford adequate protection because of a loose fit. This report was issued after the citation was terminated.

REGULATORY PROVISIONS

30 C.F.R. § 56.5-50 provides in part as follows:

56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of tha specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, 'General Purpose Sound Level Meters,' approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Healt Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound l dBA, sl respons
8	9
6	9
4	9
3	9
2	10
1-1/2	10
1	10
1/2	11
1/4 or less	11

* * *

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce

SUES

1. Whether the evidence showed that Respondent failed to ilize feasible engineering controls where an employee's posure to noise exceeded permissible limits?

2. If so, what is the appropriate penalty for the olation?

NCLUSIONS OF LAW

1. Respondent is subject to the provisions of the deral Mine Safety and Health Act of 1977 (the Act) in the eration of the subject mine. I have jurisdiction over the rties and the subject matter of this proceeding.

2. Section 110(a) of the Act provides that if a olation occurs of a mandatory health or safety standard, a vil penalty shall be assessed for the violation.

3. On October 17, 1984, a shovel operator at the subject ne was exposed to noise 2.28 times the permisible level; the posure was equivalent to 96 dBA for 8 hours per day.

4. There were feasible engineering controls available to duce the exposure, namely the installation of a vinyl curtain tween the shovel operator and the shovel motor.

5. Respondent was in violation of 30 C.F.R. § 56.5-50(b) October 17, 1984 because of its failure to utilize gineering controls to reduce the exposure of its shovel erator to excessive noise.

6. Respondent is a relatively small operator and erates only 9 months of the year.

7. The violation was moderately serious: the exposure s 2.28 times the permissible level; the shovel operator was aring inadequate personal protection. Therefore, a hearing ss was likely to result from continued exposure to the cessive noise.

8. Because MSHA had examined the noise level in the cility previously, and had never required engineering

will have any effect on Respondent's ability to continue business.

10. Respondent abated the violation promptly and ma good faith effort to comply with MSHA's requirements.

11. Considering the moderately serious nature of t violation, an appropriate penalty would be $90. Giving Respondent credit for the minimal negligence, its coopera attitude, and prompt abatement, I conclude that an approp penalty for the violation is $70.

ORDER

Based on the above findings of fact and conclusions law, IT IS ORDERED:

1. Citation 2373982 issued October 17, 1984 is AFF

2. Respondent shall within 30 days of the date of decision pay the sum of $70 as a civil penalty for the violation found herein.

James A. Broderick

James A. Broderick
Administrative Law Jud

Distribution:

Miguel J. Carmona, Esq., U.S. Department of Labor, Office the Solicitor, 230 S. Dearborn St., 8th Fl., Chicago, IL (Certified Mail)

T. J. Landwehr, General Manager, Landwehr Materials, Inc. Route 2, Appleton, WI 54911 (Certified Mail)

slk

MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 85-87-R Citation No. 2330657; 6/5/85 Modified to Citation No. 2330657-02; 6/24/85
TARY OF LABOR, E SAFETY AND HEALTH INISTRATION (MSHA), Respondent	:	Powhatan No. 6 Mine
and	:	
D MINE WORKERS OF RICA (UMWA), Intervenor	:	
TARY OF LABOR, E SAFETY AND HEALTH INISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-2 A. C. No. 33-01159-03668
v.	:	Powhatan No. 6 Mine
MINING COMPANY, Respondent	:	
and	:	
D MINE WORKERS OF RICA (UMWA), Intervenor	:	

DECISION

rances: Paul W. Reidl, Esq., Crowell & Moring, Washington, D. C. for Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio for Respondent/Petitioner;
Thomas M. Myers, Esq., United Mine Workers of America, Shadyside, Ohio for Intervenor.

to Order of Assignment dated November 14, 1985.

In a telephone conference call with the undersigned Administrative Law Judge counsel agreed that (1) the contest and penalty cases be consolidated for decision; (2) the cases be decided on the basis of the present record without any further hearing and (3) filing of post-hearing briefs be waived. 1/

Accordingly, the contest and penalty cases are hereby consolidated and decided on the present record.

The subject citation dated June 5, 1985 and issued under section 104(a) for a violation of 30 C.F.R. § 75.200, reads as follows:

> During an investigation of a 103(g)(1) complaint it has been determined that Bill Palmer, while operating the No. 14 continuous mining machine in the 6+94 crosscut No. 3 to 2 entry in the 9 left 2 east section on the first shift 5-30-85 traveled at least 6 feet 5 inches inby permanent roof supports (roof bolts) and temporary roof supports had not been installed. Information to substantiate this violation was obtained by inspecting the 6+94 crosscut and conferring with management and mine employees. The Section Foreman was Stanley Sikora.

The notice of termination dated June 11, 1985 provides:

> Safety meetings were held and the roof control plan and the hazards of going beyond roof supports were explained to all the working miners.

Subsequently on June 24, 1985, a modification was issued changing the 104(a) citation to a 104(d)(1) citation. This modification states as follows:

> No. 2330657 issued on 6-5-85 is being modified to show this action was a

---

1/ Operator's counsel filed a Notification of Subsequent Authority which the Solicitor

failure. This citation was terminated 6-11-85.

e operator does not contest the fact of violation 7). Nor has it argued that the violation was not serious. lenge is first, to the circumstances and procedures under ne (d) citation was issued and second, to the existence of ntable failure (Tr. 7-8, 37).

e first issue is the validity of the citation in light of uirements of section 104(d) that the inspector issue the n on an "inspection" and make a "finding" of unwarrantable

ree administrative law judges of this Commission now have red the meaning and effect of section 104(d) in cases like In an Order Granting In Part For Summary Decision, Speci- urther Proceedings, And Granting Motion To Consolidate in eland Coal Co., (WEVA 82-340-R et al.) (May 4, 1983), teffey explained section 104(d) in light of the tive history as follows:

> WCC correctly argues that an order issued under section 104(d) should be based on an inspection as opposed to an investigation. As hereinbefore indicated, the Secretary argues that Congress has not defined either term to indicate that Congress recognized that there is a difference between an "inspection" as opposed to an "investigation." If one wants to examine the legislative history which preceded the enactment of the unwarrantable-failure provisions of the 1977 Act, one must examine the legislative history which preceded the enactment of section 104(c) of the 1969 Act. The reason for the aforesaid assertion is that Congress made no changes in the wording of section 104(c) of the 1969 Act when it carried those provisions over to the 1977 Act as section 104(d).
>
> The history of the 1969 Act shows that there was a difference in the language of the unwar antable-failure p ovis ons

spection of the mine [illegible]
in 90 days to determine whether another unwarrantable-failure violation existed. H.R. 13950 also contained a definition section 3(l) which defined an "inspection" to mean "*** the period beginning when an authorized representative of the Secretary first enters a coal mine and ending when he leaves the coal mine during or after the coal-producing shift in which he entered."

Conference Report No. 91-761, 91st Cong., 1st Sess., stated with respect to the definition in section 3(l) of H.R. 13950 (page 63):

*** The definition of "inspection" as contained in the House amendment is no longer necessary, since the conference agreement adopts the language of the Senate bill in section 104(c) of the Act which provides for findings of an unwarrantable failure at any time during the same inspection or during any subsequent inspection without regard to when the particular inspection begins or ends.***

Section 104(c)(1) of H.R. 13950 provided for the findings of unwarrantable failure to be made in a notice of violation which would be issued under section 104(b). Section 104(c)(1)'s requirement of a reinspection within 90 days to determine if an unwarrantable-failure violation still existed explained that the reinspection required within 90 days by section 104(c)(1) was in addition to the special inspection required under section 104(b) to determine whether a violation cited under section 104(b) had been abated. Section 104(c)(1), as finally enacted, eliminated the confusion about intermixing reinspections with

The legislative history discussed above shows that Congress thought of an inspection as being the period of time an inspector would spend to inspect a mine on a single day because the inspection was to begin when the inspector entered the mine and end when he left. It would be contrary to common sense to argue that the inspector might take a large supply of food with him so as to spend more than a single day in a coal mine at one time. On the other hand, Congress is very experienced in making investigations to determine whether certain types of legislation should be enacted. Congress is well aware that an investigation, as opposed to an inspection, is likely to take weeks or months to complete. Therefore, I cannot accept the Secretary's argument that Congress did not intend to distinguish between an "inspection" and an "investigation" when it used those two terms in section 104(a) and section 107(a) of the 1977 Act.

It should be noted, for example, that the counterpart of section 104(a) in the 1977 Act was section 104(b) in the 1969 Act. Section 104(b) in the 1969 Act provided for notices of violation to be issued "upon any inspection," but section 104(a) in the 1977 Act provides for citations to be issued "upon inspection or investigation." Likewise, the counterpart of imminent-danger section 107(a) in the 1977 Act was section 104(a) in the 1969 Act. In the 1969 Act an imminent-danger order was to be written "upon any inspection," but when Congress placed the imminent-danger provision of the 1977 Act in section 107(a), it provided for imminent-danger orders to be issued "upon any inspection or investigation." On the other hand,

Congress changed section 104(a) in the 1977 Act to allow a citation to be issued "upon inspection or investigation." Conference Report No. 95-461, 95th Cong., 1st Sess., 47-48, states that the Senate bill permitted a citation or order to be issued based upon the inspector's belief that a violation had occurred, whereas the House amendment required that the notice or order be based on the inspector's finding that there was a violation. Additionally, as both the Secretary and WCC have noted, Senate Report No. 95-181, 95th Cong., 1st Sess., 30, explains that an inspector may issue a citation when he believes a violation has occurred and the report states that there may be times when *** a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, [section 104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. ***

The legislative history and the plain language of section 107(a) in the 1977 Act explain why that section was changed so as to insert the provision that an imminent-danger order could be issued upon an "investigation" as well as upon an "inspection." Section 107(a) states that "*** [t]he issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110." Both Senate Report No. 95-181, 37, and Conference Report No. 95-461, 55, refer to the preceding quoted sentence to show that a citation

nent-danger order could be issued upon an inspection or an investigation so as to make the issuance of a citation as part of an imminent-danger order conform with the inspector's authority to issue such citations under section 104(a).

Despite the language changes between the 1969 and 1977 Acts with respect to the issuance of citations and imminent-danger orders, Congress did not change a single word when it transferred the unwarrantable-failure provisions of section 104(c) of the 1969 Act to the 1977 Act as section 104(d). Conference Report No. 95-461, 48, specifically states "[t]he conference substitute conforms to the House amendment, thus retaining the identical language of existing law."

My review of the legislative history convinces me that Congress did not intend for the unwarrantable-failure provisions of section 104(d) to be based upon lengthy investigations. Congress did not provide that an inspector may issue an unwarrantable-failure citation or order upon a "belief" that a violation occurred. Without exception, every provision of section 104(d) specifically requires that findings be made by the inspector to support the issuance of the first citation and all subsequent orders. The inspector must first, "upon any inspection" find that a violation has occurred. Then he must find that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. He must then find that such violation is caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. He thereafter must place those findings in the citation to

> operator to cause all persons in the area affected by such violation to be withdrawn and be prohibited from entering such area until the inspector determines that such violation has been abated.
>
> After a withdrawal order has been issued under subsection 104(d)(1), a further withdrawal order is required to be issued promptly under subsection 104(d)(2) if an inspector finds upon any subsequent inspection that an additional unwarrantable-failure violation exists until such time as an inspection of such mine discloses no unwarrantable-failure violations. Following an inspection of such mine which discloses no unwarrantable-failure violations, the operator is liberated from the unwarrantable-failure chain. Conference Report No. 95-181, 34, states that "[b]oth sections [104(d)(1)] and [104(e)] require an inspection of the mine in its entirety in order to break the sequence of the issuance of orders." [Emphasis supplied.]

Most recently, in Emery Mining Corporation, 7 FMSHRC 1908 (1985) Judge Lasher agreed with and followed Judge Steffey stating in pertinent part:

> The first mention of the words "inspection and "investigation" is at the heading of Section 103 of the Act. That heading reads "Inspections, Investigations, and Recordkeeping."
>
> Section 103(a) of the Act provides: "Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of ... (4) determining whether there is compliance with the mandatory health or safety standards . . ."

Section 103(g)(2) of the Act, relating only to "inspection," provides that prior to or during "any inspection of a ... mine, any representative of miners ... may notify the Secretary ... of any violation of this Act, et cetera."8/

Of considerable significance, the most used enforcement tool, section 104(a), mentions both inspections and investigations. It provides that "if, upon inspection or investigation, the Secretary ... believes that an operator of a ... mine ... has violated this Act, or any ... standard, ... he shall, with reasonable promptness, issue a citation to the operator. ... The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

7/ I note here that this is one of the more significant provisions of the Act in determining the validity of the order in question since it authorizes the Secretary to make an "investigation" of an accident or "other occurrence relating to health or safety." It is clear here, as well as in other provisions of the Act, that Congress saw an investigation as something different from an inspection. One can readily see the difference between the investigation of some past happening or occurrence or accident and the inspection of some physical plant or property.

8/ Section 103(g)(1) provides a procedure for the representative of miners to obtain "an immediate inspection" by giving notice to the Secretary of the occurrence of a violation or imminent

such violation do not cause imminent danger, such violation is of such nature as can significantly and substantially contribute to the cause and effect of a ... hazard, and if he finds such violation to be caused by an unwarrantable failure ... he shall include such findings in any citation given to the operator under this Act."

The second sentence of section 104(d)(1) provides for the withdrawal order in the enforcement chain or scheme contemplated by Congress in this so-called "unwarrantable failure" formula. Significantly, it provides that "If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation ... and finds such violation to be also caused by an unwarrantable failure ..., he shall forthwith issue an order requiring the operator to cause all persons ... to be withdrawn from ... such area ...."

If the position of the Secretary in this case were adopted, that is, if withdrawal orders could be issued on the basis of an investigation of past occurrences, the effect would be to increase the 90-day period provided for in the second section of section 104(d)(1) and by the amount of time which passed between the occurrence of the violative condition described in the order and the issuance of the order. 10/ [footnote omitted]

Section 104(d)(2) of the Act permits the issuance of a withdrawal order by the Secretary if his authorized representative "finds upon any subsequent inspection" the existence of violations similar

but that Congress in using those terms in specific ways in prior sections of the Act, and by not using the term "investigation" in section 104(d)(1) and (2) 11/ [footnote omitted] did so with some premeditation.

* * * * *

Finally, it is noted that section 107(a) of the Act permits the Secretary's representative to issue a withdrawal order where imminent danger is found to exist either upon an inspection or investigation.

Perusal of these various portions of the Mine Act, commencing at the point where the subject words are first used on through to the end of their use, indicates that such terms were used with care and judiciously and with an understanding of the general connotations contained in their definitions. 12/

* * * * *

12/ Reference is made to Webster's Third New International Dictionary, G. & C. Merriam Company, 1976, which defines "inspect" in the following manner: "1: to view closely and critically (as in order to ascertain quality or state, detect errors, or otherwise appraise): examine with care: scrutinize (let us inspect your motives) (inspected the herd for ticks) 2: to view and examine officially (as troops or arms)." The word "inspection," in the same dictionary, contains various definitions, which include references to "physical" examinations of various things, including persons, premises, or installations. The word "investigate"

upon an inspection of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d)(2) order may not be issued.

The foregoing decision was not appealed.

Again, most recently in Southwestern Portland Cement Comp 7 FMSHRC___ (November 25, 1985) Judge Morris also issued an O employing the same rationale and reaching the same result as Judge Steffey. Judge Morris concluded his discussion on this issue as follows:

* * * * *

I agree with Judge Steffey and I conclude that the Act does not permit a

---

Footnote 12/ (continued)

study closely: inquire into systematically: examine, scrutinize (the whole brilliance of this novel lies in the fullness with which it investigates a past) (a commission to investigate costs of industrial production. . .)."

One concludes from reading these definitions that an investigation is more applicable to the study or scrutiny of some past event or intellectual subject, whereas an inspection relates more generally to looking at some physical thing. This common distinction between these phrases is consistent with the congressional usage of the term "investigate," for example, in section 103(b) of the Act and for the use of both terms in section 104(a) of the Act.

> tion of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d) order may not be issued.
>
> As previously noted, when it intended to permit MSHA enforcement actions to proceed on the basis of an inspection or an investigation, Congress so provided. The section 104(d) requirement of an inspection cannot be dismissed as mere semantic inadvertence on the part of Congress.
>
> Section 104(d) sets forth the sanctions that may be imposed against an operator under the specific conditions discussed in that section. It follows that the inspector authorized on a miner's complaint by section 103(g)(1) cannot reduce the safeguards Congress intended to provide in section 104(d). The Secretary's reliance on section 103(g)(1) is, accordingly, rejected.

There is little that can or needs to be added to Judge Steffey's decision which thoroughly addresses the question o what section 104(d) means and how it should be interpreted i case such as this. This decision is persuasive and the inst matter falls squarely within it. The recent decisions of Ju Lasher and Morris also follow Judge Steffey's rationale and sult. In this case there is no dispute that when the inspec went to the mine he was looking into the circumstances of a event. The cited violative event of the continuous miner op tor going beyond supported roof occurred and ended several d before the inspector visited the mine. The unsupported roof bolted later on the same day the violation occurred which wa long before the inspector arrived. Because the inspector he was engaged in the investigation of a past happening rather an inspection of an existing situation he could not issue a citation. Since the inspector could not issue a (d) citatio the sub-district manager could not do so either. The power modify exercised by the sub-district manager pursuant to sec

an inspector on a roof control technical "investigation". Monterey Coal Company, 5 FMSHRC 1223 (1983). As the decision makes clear, the term "investigation" in that case was the resu of MSHA computer code labels rather than the statute itself and the Judge expressed difficulty in understanding any real distin tion between a spot inspection and activity to determine whethe an operator was complying with its roof control plan. That the was no real distinction in that case is apparent because the in spector there was looking into and observing on-going and prese events unlike this case which involved only looking back into a specific past happening. Even more importantly, as Judge Koutr explained, the walk-around pay provision is governed by its unique legislative history and by judicial decisions which inte pret it in light of that history. Section 104(d) which has its own terms and legislative history must be governed by them. Accordingly, Monterey is distinguishable from this case.

In light of the foregoing, I hold that the (d) citation cannot stand and must be modified to an (a) citation.

Mention must also be made of the manner in which the sub-district manager proceeded. He ordered a supervisory in- spector to order the issuing inspector to change the (a) citati to a (d) citation (Tr. 351-352). And he testified that his dec sion to modify the citation was based upon prior safety meeting he had held with the operator and upon certain MSHA policy memo randa regarding the issuance of 104(d) citations and orders for roof control violations (Gx-5, Gx-6, Gx-7, Tr. 358-368). Final ly, he never spoke to the issuing inspector and he did not know or care what was done by the section foreman who was in charge when the violation occurred (Tr. 351-352, 399). The sub-distri manager, is of course, a duly authorized representative of the Secretary with power under section 104(h) to modify citations. But he cannot exercise this power based solely upon blanket ad- ministrative fiat which indiscriminately decrees that all secti foreman must have known or should have known of this type of vi lation regardless of what actually occurred in the particular case. I do not read the MSHA memoranda as requiring such an approach (Gx-5, GX-6, GX-7). In any event, the sub-district manager followed such a policy here and his action must be dis- approved of because the result reached by a duly authorized representative, whatever his administrative level, must be base upon the facts of the case involved. There is a dispute betwee the sub-district manager and the operator's mine manager over what was discussed at their meetings, but this makes no differ- ence beca se un arrantable fail c i e e ased on

egligence, infra. If an operator wishes to successfully challenge an intermediate administrative action such as the sub-district manager's, it would be better advised to make the attempt where it can prevail on the merits. I set forth my view on the propriety and effect of the sub-district manager's action so that if an appeal is taken and the Commission disagrees with my determination regarding the "inspection" requirement of section 104(d), further remands will be unnecessary.

There remains for consideration the penalty case. As set forth above, the operator admits the violation and has not contested that the violation was serious. I take official notice that roof falls remain a major source of serious accidents in the mines.

Next, negligence must be determined. In this connection an exposition of the facts is appropriate. Near the end of the hoo owl shift on the morning of May 30, 1985, the section foreman, Mr. Sikora, assigned the continuous miner operator, William Palmer, the task of cutting coal in the crosscut going from the No. 3 entry towards the No. 2 entry (Tr. 615-618). This was the second cut into the crosscut. The first cut previously had been taken by someone else (Tr. 437, 440). According to the engineer's map and the witnesses, the first cut was very much off sight and on an angle (Tr. 189, 197, 269, 297-298, 324, 878-879) (Op. Exhibit 4). But Sikora did not notice this and he said he did not check because it was the end of the shift and he was in urry to go home (Tr. 659-660, 718). Palmer also did not look t see if the first cut was straight or on an angle (Tr. 451). The crosscut could not have been holed through under supported roof with just one cut and this was especially true because of the angled first cut (Tr. 670, 719, 451). However, Palmer did hole through to the No. 2 entry on one cut, but to do so he went at least several feet beyond supported roof in violation of the roo control plan (Tr. 867, 858, 954). Not only did Palmer go beyon supported roof to cut through but he pushed the coal into a pil to the further side of the No. 2 entry (Tr. 447, 677). As show by the engineer's map, pushing the coal required Palmer to go f beyond where he should have stopped (Tr. 858, 995) (Op. Exhibit 4). Sikora stated that at the time Palmer was improperly cutti through the crosscut, he (Sikora) was doing his pre-shift exami nation for the next shift (Tr. 617-618). He stated that when h returned, Palmer was cleaning up and he (Sikora) did not notice

tenance shift and the roof was bolted on the afternoon shift
May 30 (Tr. 105-106).

The foregoing facts demonstrate an egregious lack of rea
able and due care by the section foreman. When Sikora told
Palmer to cut coal in this crosscut, the cut previously taken
way off sight. Yet Sikora gave Palmer no instructions about
to proceed and did not supervise him (Tr. 617-618). Indeed,
his own admission Sikora did not even recognize the existing
was wide because it was the end of the shift and he was in a
hurry to go home (Tr. 659-660, 718). Yet it was Sikora himse
who set the sight lines for the crosscut and as he admitted,
was his responsibility to see Palmer did not make wide cuts (
638-639, 661). Moreover, Sikora acknowledged he had heard Pa
cut a little wide (Tr. 632). In addition, the union safety c
mitteeman testified Palmer was a fast worker who did not both
to clean up and who had a tendency to go to the limit to get
much coal as he could (Tr. 306, 334-335, 341). Palmer's own
testimony demonstrates his unreliability both as a continuous
miner operator and as a witness. Thus, Palmer admitted he di
not pay much attention to excessively wide or deep cuts (Tr.
427-428). His attempt to excuse his wide cuts because of a
missing lug was contradicted by every other witness who addre
the issue (Tr. 422-424, 455, 632-633, 740, 950). So too, his
general justification of his conduct on the grounds the compa
encouraged such actions is undercut by his acknowledgment tha
management did not tell him to take wide or deep cuts (Tr. 46
484, 486-487). Finally, Palmer described himself as one of t
fastest workers there is (Tr. 428). The picture is, therefor
clear. Palmer was a fast and careless worker who gave little
any, thought to safety and whose excuses are unsupported by
anyone else and are lost in a maze of self-contradictions.

It was to such an individual that Sikora assigned the ta
of cutting coal in the crosscut near the end of the shift. B
Sikora turned his back on the time element and on the off sig
nature of the pre-existing first cut, both of which increased
pressure on the continuous miner operator to complete the
crosscut on that shift in one cut. When the circumstances un
which this task was assigned are combined with the nature of
individual to whom the job was given, what happened was all b
inevitable, i.e. the taking of all coal on one cut and the co
tinuous mine operator in violation by going far beyond suppor
roof. The union safety committeeman testified the circumstan
made it "tempting" to take all the coal on one cut (Tr. 329).
an individual like Palmer it would be virtually irresistible

ern Ohio Coal Company, 4 FMSHRC 1459 (1982). I conclude the
lor is guilty of gross negligence. 2/

Clearly too, Palmer was extremely negligent and since his habits were well known, his conduct was foreseeable and efore also attributable to the operator, A. H. Smith, 5 RC 13 (1983). However, for purposes of determining assess- of the amount of the penalty in light of negligence, ideration of Sikora's behavior is sufficient.

The operator's size is large (Tr. 972, 980). In absence of ence to the contrary I find imposition of a penalty will not ct its ability to continue in business. The parties agreed since October 1982 there were two violations at this mine, going under unsupported roof (Tr. 380). Overall, the ator had a worse than average history of violations but it improving by the time of the hearing, and the operator was showing a positive attitude toward safety (Tr. 384-387). I ot the evidence regarding prior history, but as appears in evidence of improvement is after-the-fact insofar as this is concerned. Finally, in absence of any evidence to the rary I find there was good faith abatement.

In light of the foregoing considerations and in accordance the statutory criteria in section 110(i) a penalty of $5,000 ssessed.

ORDER

It is Ordered that the subject 104(d) citation is Modified 104(a) citation.

I have not overlooked testimony regarding the operator's generally cooperative and positive attitude. But that evidence cannot overcome what occurred in this case.

Chief Administrative Law Judge

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TURRIS COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 85-12-R
v.	:	Citation No. 2323276; 10
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 85-31-R
	:	Citation No. 2491962; 12
	:	
	:	Docket No. LAKE 85-32-R
	:	Citation No. 2491965; 12
	:	
	:	Docket No. LAKE 85-35-R
	:	Citation No. 2491973; 12
	:	
	:	Elkhart Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. LAKE 85-53
	:	A.C. No. 11-02664-03547
	:	
v.	:	Docket No. LAKE 85-68
	:	A.C. No. 11-02664-03551
TURRIS COAL COMPANY, Respondent	:	
	:	Docket No. LAKE 85-70
	:	A.C. No. 11-02664-03552
	:	
	:	Elkhart Mine

ORDER DENYING MOTION TO APPROVE SETTLEMENT

On January 13, 1986, Petitioner filed a motion to dism these proceedings and approve a settlement reached between the parties.

Four alleged violations are involved. The first is in in Order 2323276 which charges a violation of 30 C.F.R. § 75.200 because of an alleged inadequately supported roof. The violation was originally assessed at $900, and the part propose to settle for $750. The motion states that the violation resulted from a high degree of negligence and tha "if a roof fall would have occurred two miners could have been killed." The order indicates that the occurrence

The two other roof control violations contained
Docket No. LAKE 85-70, the parties propose to settle
the amount originally assessed.

Order 2491973 (issued under section 104(d)(2)) w
originally assessed at $850. It charged a violation
C.F.R. § 75.503 because of a permissibility violation
battery powered scoop. The motion states that the vi
resulted from a high degree of negligence and that or
could have been killed from operating equipment not i
permissible condition. The motion further states tha
Petitioner has agreed to amend the citation from a 10
order to a 104(a) citation and that Respondent "did n
intentionally operate its machine in violation of the
In my judgment, the motion does not show justificatio
the reduction in the penalty, based on the criteria i
section 110(i) of the Act.

Therefore, the motion to dismiss and approve set
is DENIED. The matter will be rescheduled for hearin
a subsequent notice.

James A. Broderick
Administrative Law Judge

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JAN 10 1986

CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 85-134
Petitioner	:	A.C. No. 01-01401-03609
v.	:	
	:	No. 7 Mine
M WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

fore: Judge Merlin

The Solicitor has filed a motion to approve a settlent for the two violations involved in this matter. The iginally assessed amounts totalled $2,500 and the proposed ttlements are for $1,200.

The first citation was issued for failure to make a ligent search for a fire after cutting operations. After acetylene and oxygen torch was used to cut a belt header, ployees checked for fire and found nothing. But several urs after again searching and using appropriate measuring struments a fire was found. The Solicitor states inter ia, that the only evidence he has that a diligent search s not made was the failure to find the fire immediately. I ve some difficulty understanding the Solicitor's representaons but interpret him to be saying that the degree of dilince shown by the operator was not as great as it should ve been rather than the inspector's original thought that ere was no diligent search. On this basis I accept the licitor's representation and approve the recommended ttlement of $300.

The second citation was issued for an accumulation of mbustible materials. The Solicitor states that although an cumulation admittedly existed, MSHA does not know its tent. On this basis I accept the recommended settlement ich is a substantial amount and adequately reflects the scribed gravity of the violation.

Paul Merlin
Chief Administrative Law Judge

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January 16, 1986

TARY OF LABOR, E SAFETY AND HEALTH INISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-64-M A. C. No. 04-04230-05506
v.	:	Quarry-Quarry Plant
WESTERN PORTLAND CEMENT PANY, Respondent	:	

DECISION APPROVING SETTLEMENT

e: Judge Merlin

The Solicitor has filed a motion to approve settlements of hree violations involved in this matter. The original sments totaled $1,800, and the proposed settlements total

Citation No. 2364967 was issued for a violation of F.R. § 56.14-1 when an inspector observed that the clinker conveyor tai) pulley was not guarded. The original assess- for this violation was $600, and the proposed settlement is The original assessment was based on the operator's re to abate the violation which had been previously reported nagement by the company's safety department. The Solicitor es however, that the violation itself was of low gravity and the operator which is large has an exceptionally small prior ry of violations. Also the proposed settlement is almost as much as would have been assessed under the regular la. I accept the Solicitor's representations and approve oposed settlement. However, a failure to abate promptly is ter for concern and the operator should take steps to see does not happen again because if it does, I will not accept a settlement from the Solicitor regarding this operator.

Citation Nos. 2364968 and 2364969 were issued for violations C.F.R. § 56.9-7 and 30 C.F.R. § 56.11-12, respectively. An ctor obser ed la k of a e ergen y stop cord o h nk

Paul Merlin
Chief Administrative Law Judge

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ARCHIVE

RY OF LABOR,	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ISTRATION (MSHA),	:	Docket No. KENT 85-98
Petitioner	:	A.C. No. 15-13881-03555
v.	:	
	:	Pyro No. 9 Slope
NING COMPANY,	:	William Station
Respondent	:	

DECISION

nces: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Judge Koutras

Statement of the Case

s is a civil penalty proceeding initiated by the petigainst the respondent pursuant to section 110(a) of eral Mine Safety and Health Act of 1977, 30 U.S.C. . Petitioner seeks a civil penalty assessment in the f $206 against the respondent for an alleged violation tory safety standard 30 C.F.R. § 75.1103-4(a)(1). The nt filed a timely answer contesting the alleged violad a hearing was convened in Evansville, Indiana, on 3, 1985. The parties waived the filing of posthearfs. However, I have considered the oral arguments the parties during the hearing in the adjudication of e.

Issues

Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalty will not adversely affect the respondent's abil ity to continue in business. They also stipulated that the violation was abated in good faith by the respondent (Tr. 26).

Discussion

Section 104(a) "S&S" Citation No. 2505477, issued on January 7, 1985, cites a violation of 30 C.F.R. § 75.1103-4(a)(1), and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit, I.D. 003 in that the automatic fire sensor line was not installed the entire length of the beltline going to the unit 3 tailpiece. The automatic fire sensor line was installed up to within two crosscuts outby the tailpiece (140 ft. from the end of the sensor line to the tailpiece).

Petitioner's Testimony

MSHA Inspector George Siria testified as to his background and experience, and he identified exhibit P-7 as a copy of the citation issued by Inspector Frank R. Gerovac on January 7, 1985. Mr. Siria stated that Mr. Gerovac was relatively new in the area and was not familiar with the mine or MSHA's policies and that he accompanied Mr. Gerovac in order

of the mine on January 7, 1985, while he was with Mr. Gerovac and that he issued a citation for some violative conditions. He identified exhibit P-5 as an official copy of an MSHA inspection report which indicates that he and Mr. Gerovac inspected the mine and issued citations. He confirmed that the report verifies that Mr. Gerovac issued the citation for a violation of section 75.1103-4(a)(1) after finding that the fire sensor line had not been installed for the entire length of the beltline on the number three unit (Tr. 43).

Mr. Siria stated that the hazard associated with the violation concerns a lack of warning in the event of a fire on the beltline. The fire sensors are activated by a sensoring head located at 125-foot distances, and they are required to alert miners in the event of a fire on the conveyor belt. The sensors are interconnected with the warning device boxes which sound an alarm in the event of a fire. Possible sources of ignition along the beltline would be loose coal, coal dust, and float coal dust (Tr. 45-57).

On cross-examination, Mr. Siria confirmed that Mr. Gerovac's prior experience was in metal and non-metal inspections, and he did not know the extent of his experience in underground coal mining. He confirmed that he did not travel the belt with Mr. Gerovac during his inspection, and petitioner's counsel stipulated that Mr. Gerovac did not issue any citations for coal spillage on the beltline during his inspection (Tr. 49). Counsel also stipulated that no citations were issued for lack of water or rock dust on the beltline (Tr. 52-53).

Mr. Siria did not know when the belt was last added on the unit in question, and could not state whether it was installed within 24 hours of the issuance of the citation by Mr. Gerovac (Tr. 54). When asked to explain his understanding of an exception found in section 75.1103-4(a)(1), Mr. Siria responded as follows at (Tr. 54-56):

> Q. Based on what you just read, if the belt -- hypothetically speaking -- if the belt had been put on in the past twenty-four hours, would there be a citation associated with what was written.

WITNESS: Repeat the question.

Q. If, according to the standard, the belt had been put on within twenty-four hours of the citation and it was within a hundred and twenty-five feet, would there be a violation.

A. I didn't make the belt.

BY THE COURT: No, he wants you to assume that it was. In other words, what he's trying to establish is whether or not this section would apply in this case given the assertion that . . . the argument that twenty-four hours hadn't elapsed yet and, therefore, they weren't required to have the belt sensors at the places where Mr. Gerovac thought they should be.

WITNESS: Your Honor, it's hard to answer that question yes or no. There's always extenuating circumstances.

BY THE COURT: All right, you can explain whatever . . . go ahead and explain that.

A. If the . . . if I felt that there was a danger with the beltline being back, with the fire sensor line being a . . . ah, more than a hundred twenty-five outby . . . really, I mean, I'm not meaning argumentative and I'm not trying to be smart, but I wouldn't care when the belt had been moved if I thought there was a danger to a coal miner, I would require the belt be . . . the sensoring line to be moved up if there was any . . . this is a dust problem area and, like I previously stated, . . .

Q. Based on what has already been stipulated, do you know of any problems in that area that would have dictated that to be considered a problem area to the point a citation would be written beyond the standard of the law.

another violation of the standard, he would have issued additional citations.

Q. So if there would have been additional problems that would have warranted writing the citations above and beyond the standard of the law, he would have also written citations to correspond with that.

A. In his judgment.

Q. And within his judgment, he did not.

A. We don't see them.

Mr. Siria stated that the presence of coal dust mixed with fire clay on the unit did not present an ignition problem, and even though he independently found an exposed cable wire in another area during his inspection, any fire resulting from that condition would not be detected by the required sensor in question in the area cited by Mr. Gerovac because the cable was too far from the cited belt (Tr. 58). Mr. Siria found no excessive levels of methane on the unit (Tr. 60), and he confirmed that he did not personally observe the conditions cited by Mr. Gerovac (Tr. 61).

Respondent's Testimony

Ray Taylor, respondent's chief electrician testified that his responsibilities include the operation of the beltlines at the mine and to insure that they are properly installed. He was on the unit on the day of Mr. Gerovac's inspection. He stated that the belt extension was installed during the 2:00 a.m. shift on January 6th, and it was moved two or three crosscuts for a distance of approximately 120 feet. The fire sensors were installed by his crew during the day shift on January 7th within 24 hours of the extension and installation of the belt, and he believed they were installed before 4:00 p.m. that day (Tr. 62-70).

Mr. Taylor stated that based on his interpretation of the regulation, once a belt extension is completed, the respondent has 24 hours within which to install the sensors. In his view, regardless of the number of feet that the belt is extended, the respondent would still have 24 hours within which to advance and install the sensor line. He confirmed

unit that day, and the citation was abated [illegible]
75).

Mr. Taylor described the fire sensor system and th
installation procedures, and he confirmed that in the e
of a malfunction of one of the sensors, the entire syst
will malfunction and a warning light or alarm will ind
that the faulty sensor needs to be repaired (Tr. 103-10

Arguments Presented by the Parties

Petitioner's interpretation of the standard is tha
requires that belt sensors be installed at the beginni
end of a beltline regardless of its length. Petitione
tains that the regulatory exception allowing 24 hours
installation of sensors only applies to the distances
the beginning and end of a beltline and does not apply
requirement that a sensor be at the end of the beltlin
regardless of its distance. Assuming a beltline is 37
long, petitioner argued that a sensor must be installe
the beginning and end at the time the belt or any exte
is installed, and that the remaining sensors in betwee
beginning and end may be installed within 24-hours (Tr
92, 128-129).

Petitioner argued that since there is electrical
at the belt tailpiece, and since shuttle cars are oper
in that area, there is a likelihood of coal accumulati
a potential fire at that location, and the rationale o
interpretation that a sensor is required at the end of
belt is a reasonable one (Tr. 96).

Assuming that the regulatory exception is applica
the end of the belt line, which had been extended for
tance of 140 feet, petitioner concedes that the respon
would be allowed 24 hours within which to install a se
the 125 foot location (Tr. 98). Petitioner agrees tha
inspector was apparently concerned about the lack of a
at the end of the 140 foot extended belt, and it took
position that subparagraph (1) of the regulation requi
sensor at the end notwithstanding the 24 hour exceptio
in subparagraph (3) (Tr. 99).

nel will advance the fire sensor line (Tr. 116-117).

The respondent explained that its belts are advanced for distances of 120, 180, or 210 feet at a time depending on the crosscut centers. The fire sensors are purchased in 500 foot rolls, with sensors at 75 foot intervals. The sensors are premeasured, and the sensor line is uncoiled and advanced for installation after the belt has been advanced (Tr. 103). Assuming the belt is advanced 140 feet, as it was in this case, the sensors would be advanced for this same distance up to the tailpiece end of the extended belt, and respondent believes that the regulatory exception permits a 24-hour period for this to be done (Tr. 87).

The respondent does not dispute the fact that the fire sensor line was not immediately advanced for 140 feet at the time the belt was extended that distance. However, respondent takes the position that when the distance from the tailpiece to the loading point reaches 125 feet, it has 24 hours to advance the sensor heads to the end loading point (Tr. 127). On the facts of this case, the respondent points out that Inspector Gerovac arrived at the scene four hours after the belt had been extended, and even though it had been extended for more than 125 feet, the respondent believes that it was not required to immediately advance the fire sensor line because of the 24 hour "grace period" exception found in subparagraph (3) of section 75.1103-4(a) (Tr. 85-85; 101).

The respondent points out that the fire sensor line had been extended up to the point where the belt extension started, and that automatic fire suppression devices were located at the tailpiece feeders (Tr. 113). In response to the petitioner's assertion that the regulatory exception applies only to the 125 foot belt increments, or the points between the beginning and end, respondent points out that requiring the immediate installation of a sensor at the end of the belt while allowing 24 hours to install one in the middle makes no sense because the sensors operate in sequence and not independently of each other. A sensor located at the end of a belt will not operate until such time as the middle one is installed (Tr. 94).

of the exception found in subparagraph (3) (Tr. 106). asked to give an opinion as to what the standard writ in mind when the regulation was promulgated, he respo don't know what this guy was thinking about when he w that" (Tr. 107-108).

Mr. Siria candidly conceded that accepting the p tioner's argument that the 24 hour exception applies the sensors between the beginning and end of a beltli result in a 500 foot belt without fire sensors betwee beginning and end of the belt over a 24-hour period. asked to explain the logic of requiring an immediate at the end of the belt and not in the middle, he resp "because that's the most likely place for a fire to b the tailpiece" (Tr. 108).

When asked for his opinion about the theory of t respective positions of the parties in this case, Mr. responded "I think they're both right" (Tr. 110), and explained further as follows (Tr. 113-114):

> I think you have twenty-four hours to get the sensoring head if it's in excess of a hundred and twenty-five feet. But I think the sensoring are supposed to be from the beginning to the end of the belt like it states in the first part of the paragraph. But like the guy . . . like I said, maybe the guy that wrote this said . . . when they extend their sensoring wire, they're automatically on a hundred and twenty-five, they don't have to put them on. Ray said now they're seventy-five. So they don't have to add these sensoring heads. But I'm sure that when the law first came into effect, they put a line in and they added sensoring heads later. But I think, like the first paragraph, like Tom, Mr. Grooms said, it should be from the beginning to the end. And I think . . . like Bruce says that it should be . . . they should have twenty-four hours to put that in, any in between. Now, this would be an exception to them because they don't have to

(a) Automatic fire sensor and warning device systems shall provide identification of fire within each belt flight (each belt unit operated by a belt drive).

(1) Where used, sensors responding to temperature rise at a point (point-type sensors) shall be located at or above the elevation of the top belt, and installed at the beginning and end of each belt flight, at the belt drive, and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) of this section. (Emphasis added.)

The exception referred to in paragraph (a)(1), provides in relevant part as follows:

(3) When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached. * * * (Emphasis added.)

The parties agreed that the respondent's belt fire sensors are point-type sensors. The term "flight" as applied to a belt system is defined by the Dictionary of Mining, ineral, and Related Terms, U.S. Department of the Interior, 1968 Edition as "a term sometimes applied to one conveyor in a tandem series."

Inspector Gerovac noted in his citation that the required fire sensor line in question had been installed up to the flight connection point in question at the time he viewed the cited condition. The parties assumed and agreed that the

been immediately extended to the end of the newly ad
belt flight. The termination notice issued by Inspe
Gerovac states that the violation was abated by exte
fire sensor line to the belt tailpiece. Since the f
line is one that is simply uncoiled and advanced as
flight is advanced, I assume that the respondent unc
and extended it for 140 feet to the end of the newly
tailpiece and loading point location to achieve abat
compliance.

It seems to me that the starting point for the
tion of the regulatory language found in section 75.
is the newly installed belt flight connection locati
According to the credible testimony the belt flight
installed on the immediate shift prior to the inspec
arrival, and it had been in place some 4 hours prior
arrival. The parties agreed that the fire sensor li
place up to and including the belt flight connection
tion, but disagree as to what was required from that
The petitioner relies on the language found in paragr
which requires the installation of sensors at the beg
and end of each belt flight and in increments along e
flight so that the maximum distance between sensors d
exceed 125 feet. The petitioner's interpretation of
regulatory language is that it imposes a requirement
sensors be installed at the beginning and end of each
flight. Since there was no sensor at the end of the
extended belt flight in question, petitioner maintain
violation has been established.

With regard to the application of the 24 hour ex
found in paragraph (3), petitioner's interpretation i
it only comes into play when the extended belt flight
piece reaches a point 125 feet from the last outby se
the flight connecting point. In the instant case, pe
agrees that the respondent had 24 hours from the time
belt flight in question was installed to advance the
sensor 125 feet in order to comply with the requireme
sensors be located at distances not to exceed 125 fee
insists that the sensor at the end of the 140 foot be
flight should have been installed immediately upon co
of the installation of the advanced belt flight. In
the petitioner suggests that the sensor line should h

beginning and end of a belt flight as well as the sensors which are required at intervals of 125 feet along the belt flight. Respondent's representative conceded that when th belt was advanced 140 feet, sensor's were required at the beginning and end of that belt flight. However, he took t position that the fire sensor line would be advanced to th beginning of the flight when the belt is advanced, and tha the respondent would still have 24 hours within which to advance the line to the end of the flight (Tr. 87-88). Respondent's representative argued that section 75.1103-4 does not impose any time period within which the sensors m be located at the beginning and end of a belt flight, and asserted that since the regulation does not differentiate to when sensors must be installed at the beginning and end a belt flight, the respondent is free to rely on the 24 ho for the installation of sensors at both locations (Tr. 99-100). His interpretation of the exception noted in par graph (1) is that it also applies to the end of a belt fli (Tr. 101).

Respondent argues that requiring a sensor at the end the belt flight immediately upon the completion of the ins lation of the belt flight, while permitting 24 hours to install one at the beginning, is inconsistent because the beginning and intervening 125-foot locations will be witho fire sensor protection for a 24-hour period, while the end the belt will be immediately protected. Petitioner mainta that requiring a sensor at the end immediately within the completion of the belt flight will insure fire protection the critical tailpiece loading point where equipment is op ting and coal accumulations or spillage are most likely to occur. Since the remaining portion of the belt will be pr tected with sensors located at intervals of 125 feet, peti tioner maintains that requiring the immediate location of sensor at the end of the belt will simply insure that the entire belt flight has fire sensoring devices when it is installed and operational.

Petitioner maintains that the acceptance of the respo dent's interpretation of the standard will result in the u of an unprotected belt flight during coal production. Sin the 24 hour exception applies to production hours, petitio

The respondent asserts that [illegible]
intervening sensors on a belt flight while at the same
insisting that a sensor be immediately installed at the
when the flight is installed is illogical because its b
sensors operate in sequence or in tandem much like a "s
of Christman lights," and that in the event one sensor
functions, the entire sensor system will not work. In
port of this claim, the respondent relies on the testim
its Chief Electrician Ray Taylor.

Mr. Taylor's testimony does not support the respon
suggestion that one malfunctioning sensor along a belt
will render the entire sensor system useless or cause i
shut down. Mr. Taylor testified that if one sensoring
should fail at one location along a belt flight it will
ger an alarm or signal to indicate that there is a malf
tion or fault in the system which needs attention. He
ically stated that one malfunctioning sensor will not s
down the entire sensoring apparatus, but will simply gi
alert that repairs are required (Tr. 103-104). The onl
function which will shut the entire system down is one
by the cutting of the sensoring cable itself (Tr. 104).

Paragraph (1) states that where used, sensors must
located at the beginning and end of a belt flight. Thi
guage is clear and unequivocal. In my view, once a bel
flight is installed sensors must be located at the begi
and end of the belt flight regardless of the length of
flight. If the flight is 100 feet long, two sensors ar
required; one at the beginning and one at the end. If
flight is 150 feet long, three sensors are required; on
the beginning, one at the end, and one at an intervenin
tion not in excess of 125 feet from the first one. As
tional belt flights are added, the requirements for add
sensors must be determined by using the last installed
at the new tailpiece location as a new starting referen
point.

With regard to the exception found in paragraph (
agree with the petitioner's interpretation that it appl
only to the location of sensors which must be located a
intervening locations along a belt flight not in excess

ocating sensors at locations which exceed 125 feet, and does ot affect the requirement that they be at the beginning and nd of a belt flight. The first sentence of the exception ound in paragraph (3) provides that when the distance from a elt tailpiece to the first outby sensor reaches 125 feet uch sensors shall be installed and put in operation within 4 production shift hours after the 125 feet distance is eached. Thus, I conclude that the phrase "such sensors" nly applies to the sensors which are required at 125 foot ntervals along a belt flight, and not to those required at he beginning and end of the flight.

On the facts of this case, I conclude and find that the etitioner's interpretation and application of the standard n question is correct, and I reject the interpretation dvanced by the respondent. I conclude and find that a sen- or was required at the point where the cited belt flight eached a distance of 125 feet as well as at the end of the ight. Since the flight had been installed 4 hours prior to he arrival of the inspector on the scene, I conclude that e exception found in paragraph (3) of section 75.1103-4 lowed the respondent an additional 20 production shift ours within which to advance and install a sensor at the 5 foot distance, but did not allow the respondent any addi- onal time within which to advance and install a sensor at he end of the flight. I conclude that a sensor at the end f the belt flight was required immediately upon the installa- ion of the operational belt flight. Since the belt flight s in use and operational at the time the citation was sued, and since there is no dispute that a sensor was not cated at the end of the flight, I conclude that a violation as been established and the citation IS AFFIRMED.

istory of Prior Violations

Exhibit P-1 is a computer print-out summarizing the spondent's compliance record for the period January 1, 1983 hrough January 6, 1985. That record reflects that the spondent paid civil penalty assessments totalling $75,033 or 800 violations, 29 of which were for violations of the ire sensor requirements found in 30 C.F.R. § 75.1103, 5.1103-1, 75.1103-4, and 75.1103-5. Taking into account the

Respondent's Ability to Continue in Business

The parties have stipulated as to the scope of respondent's mining operations and agreed that the civil penalty will not adversely affect the respond ity to continue in business. I adopt these agreeme findings on these issues.

Good Faith Abatement

The parties stipulated that the conditions cit violation in this case were corrected in good faith respondent within the time fixed by the inspector. and conclude that the respondent exercised good fai ing the violation.

Negligence

I conclude and find that the respondent knew o have known of the requirement for locating the sens end of the belt flight in question and that its fai advance the sensor line before the inspector found tive condition is the result of its failure to exer reasonable care. Although I have taken into accoun timony of Chief Electrician Taylor that work had be advance the sensor line during the shift when the was issued, the fact is that the line was not exter end after the belt flight was installed. Considerі Mr. Taylor's interpretation of the standard, there strong inference that had the shift ended, the resp would have waited until subsequent shifts to advanc to the end of the belt.

Gravity

I conclude and find that the violation was ser Failure to extend the fire sensoring device to the belt flight after it was installed presented a haz in the event of a fire at the end of the belt, the no warning device available to alert the miners of hazard. Although the respondent's representative that a fire suppression device was installed at th belt, there is no credible testimony to support hi

since the inspector who issued the citation did not testify as to any factors which could contribute to an accident, I have no factual basis, other than the fact that the sensor a the end of the belt was missing, to support an "S&S" finding Inspector Siria did not view the cited conditions, and he wa not with Inspector Gerovac when the citation was issued. Under the circumstances, the "S&S" finding in this case IS VACATED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, respondent is assessed a civil penalty in the amount of $175 for section 104(a) Citation No. 2505477, issued on January 7 1985, for a violation of 30 C.F.R. § 75.1103-4(a)(1).

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $175 within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt o same, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Bruce Hill, Safety Manager, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

/fb

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PR
	:	Docket No. KENT
	:	A.C. No. 15-1388
v.	:	
	:	Pyro No. 9 Slope
PYRO MINING COMPANY, Respondent	:	William Statio

DECISION

Appearances: Thomas A. Grooms, Esq., Office of Solicitor, U.S. Department of Labo Nashville, Tennessee, for the peti Bruce Hill, Director of Safety and Pyro Mining Company, Sturgis, Kent the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated tioner against the respondent pursuant to section the Federal Mine Safety and Health Act of 1977, 3 § 820(a). Petitioner seeks civil penalty assessm the respondent for three alleged violations of ce tory safety standards found in Part 75, Title 30, Federal Regulations. The respondent filed a time contesting the alleged violations, and a hearing in Evansville, Indiana, on December 3, 1985. The waived the filing of posthearing briefs. However considered the oral arguments made by the parties hearing in the adjudication of this case.

Issues

The issues presented in this case are (1) wh conditions or practices cited by the inspector co violations of the cited mandatory safety standard

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that at all times relevant to this case, the overall coal production for the respondent's operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business. They also stipulated that the violations were abated in good faith (Tr. 26).

Procedural Ruling

During the course of the hearing in this case, the parties raised the question of the validity of the section 104(d)(2) unwarrantable failure order issued by the inspector. In a bench ruling, I held that the "unwarrantable failure" issue in connection with the order is not an issue in a civil penalty case. I also ruled that the validity of the underlying order is irrelevant, and I advised the parties that the issue here is whether or not a violation of mandatory safety standard 30 C.F.R. § 75.316 occurred, and if so, the appropriate civil penalty which should be assessed taking into account the civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 2508809, issued on May 16, 1985, cites a violation of 30 C.F.R. § 75.316, and the condition or practice is stated as follows:

> The approved ventilation, methane and dust control plan (approved 2/28/85 see page 1 paragraph A) was not being followed on the

June 3, 1985, cites a violation of 30 C.F.R. § 75.400, an the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit Sec. ID 003 in that an accumulation of loose coal approximately 4 feet wide, 14 feet long and 18 inches in depth was present on the north side of the ratio feeder. The accumulation of loose coal was on a trailing cable of one of the joy shuttle cars.

Section 104(a) "S&S" Citation No. 2508574, issued on May 23, 1985, cites a violation of 30 C.F.R. § 75.400, an the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit ID No. 003 in that an accumulation of loose coal approximately 3 to 8 inches in depth, 10 feet wide, and 30 feet long was present in front of the ratio feeder in the belt entry of this unit. Loose coal also had accumulated around side of feeder on and around the main contact switch panels.

Petitioner's Testimony

MSHA Inspector James Franks testified that he conduc a section 103(i) spot inspection of the mine on May 16, 1 and confirmed that he issued section 104(d)(2) Order No. 2508809 because of a violation of the respondent's ventil tion and methane and dust-control plan. The mine was on "spot inspection" status because it liberates in excess o 200,000 cubic feet of methane in a 24-hour period. He id fied exhibit P-9 as the applicable plan in question and c firmed that the respondent failed to install permanent st pings up to the loading points between the intake aircour and beltline as required by Paragraph A, pg. 1 of the pla Two crosscuts had been developed and no stoppings were installed as required by the plan.

Mr. Franks identified exhibit J-1, as a sketch of th area where the violation occurred. The sketch was made f

the loading point in order to provide a smoke-free intake capeway for the use of miners in the event of an emergency ch as a mine fire. The failure to provide the required oppings increased the chances of a fire spreading. One of e crosscuts had no curtain across it, and it was possible at the other one did. The stoppings are also required to olate the belt in the event of a fire, and to insure ade- ate ventilation and air control on the beltline (Tr. 5-143).

Mr. Franks stated that coal was being mined at the time his inspection, and that four entries were being driven to velop a longwall. He observed no stopping materials or rk being performed to erect the stoppings in question, and discussed the matter with the face boss and with respon- nt's safety manager Tom Hughes. They informed him that ey intended to install the stoppings, but Mr. Franks saw no idence of any work being done to accomplish this (Tr. 145).

Mr. Franks explained the reasons for issuing a section 4(d)(2) order, and while he believed that the respondent s going to install the stoppings, he saw no evidence of any terials in the area and saw no work taking place which uld indicate when this would be done. His impression was at the respondent wanted to run coal and build the stoppings en they got around to doing it. Under the circumstances, he lieved that there was a high degree of negligence and that why he issued the order (Tr. 147).

Mr. Franks confirmed that he did not consider the viola- on to be "significant and substantial" because the ventila- on was good and he found no dangerous amounts of methane esent at the faces. He did not believe that the circum- ances presented indicated a reasonable likelihood of an cident (Tr. 147).

Mr. Franks stated that coal production ceased at 00 a.m. on May 16, 1985, but would have continued again at 00 a.m. Five people were on the unit for the purpose of stalling a beltline and the stoppings, and he estimated at it would take 45 minutes to an hour to install a stop- ng at one crosscut, assuming the materials were at the cation (Tr. 149).

On cross-examination, Mr. Franks confirmed that an adequate supply of air and no dangerous amounts on the unit. He confirmed that five men were used the beltline between 2:00 a.m. and 7:00 a.m. on May while he agreed that it may not have been practical the stoppings in before the beltline was installed believed that it could have been done. He confirmed other mines install stoppings before a beltline is but conceded that the respondent's longwall system some problems in this regard, particularly when sh are used (Tr. 154).

Although Mr. Franks could not recall the pres air lock by the beltline, he conceded that one cou been present. The purpose of the air lock is to c air current and to keep the air from going away fr faces and down the beltline. Mr. Franks confirmed two required stoppings were installed and abatemen achieved within an hour of the issuance of the vio 157). Although he could not recall a scoop at the track with cement blocks on it when he first arriv scene, he conceded that it was possibly present an delay in arriving at the scene of the violation co been caused by the fact that the travelway was blo scoop and blocks. He did not know how long it too the blocks to the stopping areas, and he could not seeing anyone working in one of the breaks before the order (Tr. 157-160).

Mr. Franks confirmed that he marked the gravi of the order "unlikely" and did not consider the v be "significant and substantial" (Tr. 163-164).

In response to further questions, Mr. Franks that coal was being loaded on the beltline, and th uous miner and possibly three shuttle cars were be during the time he was at the scene. He expressed that production was not halted in order to constru pings. He did not consider the use of temporary b curtains to be dangerous (Tr. 170). Petitioner's confirmed that an air lock was in fact installed a the sketch and that Inspector Franks was simply u this (Tr. 172).

Respondent's Testimony

spector were held up because of this congestion. Mr. Hughes
afirmed that the unit was running and that Mr. Franks was
ncerned that it was running with two open stoppings. The
t was then shut down. Although he recalled some blocks in
e of the "open holes" on the unit, he could not recall that
brattice men were on the unit. However, preparations were
ng made to construct the stoppings (Tr. 176), and the brat-
e men would be assigned to do this work (Tr. 177).

On cross-examination, Mr. Hughes confirmed that he was
present when the beltline was installed, and he explained
at someone could have told him that it was installed the
ening before, or he may have read that in a report (Tr.
-179).

Findings and Conclusions

t of Violation - Order No. 2508809

The respondent does not dispute the fact of violation in
s case (Tr. 183-184). In mitigation of the violation,
spondent's representative argued that the respondent
tended to install the stoppings regardless of the presence
the inspector on the scene (Tr. 184). In support of this
gument, respondent asserted that the blocks for the con-
ruction of the stoppings were either stored on the unit or
out to be transported to the stopping areas while the inspec-
was at the scene (Tr. 165-166). Respondent candidly
nitted that it contested the violation in order to mitigate
proposed $1,000 penalty assessment levied by MSHA for the
olation (Tr. 164).

The unrebutted testimony of Inspector Franks clearly
tablishes that the required permanent stoppings were not
stalled up to the loading point or tailpiece of the belt-
ne on the intake side of the unit in question. The respon-
nt's approved ventilation and methane and dust-control plan
quired that permanent stoppings be installed at that loca-
on, and the failure by the respondent to follow its plan
nstitutes a violation of mandatory safety standard 30 C.F.R.
75.316 as charged in the order issued by the inspector.
cordingly, the violation IS AFFIRMED.

permitted to pay the full amounts of the proposed
alty assessments made by MSHA for the violations,
tioner's counsel agreed to this proposed dispositi
7-8).

The respondent agreed to the negligence and g
ings made by the inspector at the time the citatio
issued, and I took note of the fact that the cited
ulations were cleaned up and abated within 30 minu
issuance of the citations.

I considered this matter as a joint settlemen
pursuant to Commission Rule 30, 29 C.F.R. § 2700.3
after consideration of the six statutory criteria
section 110(i) of the Act, the settlement was appr
the bench, and it is herein reaffirmed.

History of Prior Violations

Exhibit P-2 is a computer print-out summariz
respondent's compliance record for the period June
through June 3, 1985. That record reflects that t
dent paid civil penalty assessments totaling $93,6
violations. Eighty-three of these prior violation
violation of mandatory safety section 75.316, and
violations of section 75.400.

Taking into account the size of this responde
not consider its history of compliance to be a goo
I believe that the respondent needs to pay closer
to its coal accumulations cleanup procedures and t
ments of its ventilation and methane and dust-cont
I have considered the respondent's compliance reco
assessing the civil penalties in this case.

Size of Business and Effect of Civil Penalties on
Respondent's Ability to Continue in Business.

The parties have stipulated to the size and
respondent's mining operations and they agreed tha
ment of civil penalties will not adversely affect
dent's ability to continue in business. I adopt
lations as my findings on these issues.

good faith by the respondent within the time fixed by the inspectors. The stopping violation was abated within an hou of its issuance, and as previously noted, the coal accumulations violations were abated within 30 minutes of the issuance of the citations. I conclude that the respondent exercised rapid good faith abatement of the violations.

Negligence

With regard to the stopping violation, Inspector Franks believed that the respondent exhibited a high degree of negl gence in failing to construct them before the unit was place in operation. In mitigation of its negligence, the respondent argued that it fully intended to construct the stopping and had the materials available. Although this may be true, the inspector believed that the available manpower on the unit was insufficient for such a project, and he saw no evidence of any actual work in progress to construct the stoppings. However, he conceded that constructing the stoppings on an operating longwall section presented some practical problems, and he believed the respondent's contention that i fully intended to construct the stoppings. The inspector's view is that the stoppings should have been constructed when the section ceased operating on the shift prior to his arrival on the scene, and I am convinced that the inspector' arrival prompted the immediate movement of materials necessary for the construction of the stoppings. I conclude that at the time the violation was discovered, the respondent had made preparations for the construction of the stoppings, and that the arrival of the inspector simply speeded up the process. Once the work began, the stoppings were completed within an hour.

I have considered the respondent's preparatory efforts in constructing the stoppings, including the presence of mat rials for this work on the unit, as factors mitigating the civil penalty assessed for the violation. However, I conclude and find that the respondent knew or should have known of the stopping requirements of its own ventilation plan, an that its failure to construct the required stopping before the inspector found the violative condition is the result of its failure to exercise reasonable care.

tial," found no dangerous amounts of methane, quate air and an air lock were present on the stoppings were required to maintain a smoke-f the event of a fire and to insure the adequat ventilation on the beltline.

Civil Penalty Assessments

The respondent has agreed to pay the ful for Citation No. 2508574, May 23, 1985, 30 C. and the full $168 assessment for Citation No. 1985, 30 C.F.R. § 75.400.

On the basis of the foregoing findings a with respect to Order No. 2508809, May 16, 1 § 75.316, respondent is assessed a civil pena amount of $900.

ORDER

The respondent IS ORDERED to pay the civ the amounts indicated above within thirty (30 date of this decision.

George A. Kout Administrative

Distribution:

Thomas A. Grooms, Esq., Office of the Solici Department of Labor, 280 U.S. Courthouse, 80 Nashville, TN 37203 (Certified Mail)

Mr. Bruce Hill, Safety Manager, Pyro Mining Box 267, Sturgis, KY 42459 (Certified Mail)

/fb

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT RIBEL,	:	DISCRIMINATION PROCEEDI
	:	Docket No. WEVA 84-33-D
	:	MSHA Case No. MORG CD 8
Complainant	:	Federal No. 2 Mine
v.	:	
	:	
EASTERN ASSOCIATED COAL CORPORATION,	:	
Respondent	:	

SUPPLEMENTAL DECISION AND ORDER

Before: Judge Koutras

On December 18, 1985, the Commission issued its dec this matter affirming my decision of September 24, 1984, 2203, and my supplemental decision on remand of July 10, 7 FMSHRC 1059, that the respondent discriminated against complainant in violation of section 105(c)(1) of the Fed Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1 regard to the issue of attorneys' fees for the complaina private counsel, the Commission ruled that Mr. Ribel's c is entitled to a limited attorney's fees award, and it r the matter to me for further limited adjudication of thi

In response to my order of December 31, 1985, the p have submitted a stipulation with respect to the amount attorneys' fees due to Mr. Ribel, and it states as follo

> That the amount of attorneys' fees due to Mr. Ribel in connection with the participation of his private attorney in obtaining an award of costs in the amount of six hundred and five dollars ($605) is seven hundred and twenty one dollars and fifty cents ($721.50);

disposition by Judge Koutras and the Commission of Mr. Ribel's motion for an award of attorneys' fees and costs.

ORDER

The respondent IS ORDERED to pay to Mr. Ribel's pr attorney the agreed upon amount of $721.50, and payment be made within thirty (30) days of the date of this sup decision and order.

George A. Koutras
Administrative Law Judge

Distribution:

Barbara Fleischauer, Esq., 258 McGara Street, Morgantow 26505 (Certified Mail)

Ronald S. Cusano, Anthony J. Polito, Esqs., Corcoran, H Ewart, Whyte & Polito, P.C., Suite 210, Two Chatham Cen Pittsburgh, PA 15219 (Certified Mail)

Sally S. Rock, Associate General Counsel, Eastern Assoc Coal Corp., One PPG Place, Pittsburgh, PA 15222 (Certif

/fb

ETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
NE SAFETY AND HEALTH	:	
MINISTRATION (MSHA),	:	Docket No. KENT 85-187
Petitioner	:	A.C. No. 15-13881-03570
v.	:	
	:	Pyro No. 9 Slope
MINING COMPANY,	:	William Station
Respondent	:	

DECISION

arances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

re: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petier against the respondent pursuant to section 110(a) of Federal Mine Safety and Health Act of 1977, 30 U.S.C.)(a). Petitioner seeks civil penalty assessments against respondent for two alleged violations of certain manda- safety standards in Part 75, Title 30, Code of Federal lations. The respondent filed a timely answer contesting alleged violations, and a hearing was convened in svville, Indiana, on December 3, 1985. The parties waived filing of posthearing briefs. However, I have considered oral arguments made by the parties during the hearing in his case.

Issues

The issues presented in this case are (1) whether the itions or practices cited by the inspector constitute ations of the cited mandatory safety standards, and

1. The Federal Mine Safety and Health Act
Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.

3. Commission Rules, 20 C.F.R. § 2700.1 et

Stipulations

The parties stipulated that at all times re
this case, the overall coal production for the r
operating company was 5,020,840 tons, and that t
for the Pyro No. 9 William Station Mine was 2,04

The parties stipulated that the payment of
civil penalties will not adversely affect the re
ability to continue in business. They also stip
the violations were abated in good faith within
allotted (Tr. 26).

Procedural Ruling

The subject of this civil penalty proceedin
tion 104(d)(2) "unwarrantable failure" order iss
tor Stanley on May 21, 1985. The petitioner see
penalty assessment for a violation of mandatory
dard 30 C.F.R. § 75.316, as stated on the face o
In support of his order, Inspector Stanley made
a previously issued section 104(d)(1) Order No.
issued at the mine on May 9, 1985 (Exhibit P-10)

The parties stipulated that there was no in
"clean inspection" of the mine during the period
the date of the underlying order, and May 21, 19
the order in this case was issued.

Petitioner's counsel asserted that since th
order of May 9, 1985, has been contested by the
he was unclear as to whether or not the validity
order had to be first established in order to su
order issued by Inspector Stanley on May 21, 198

In a ruling made from the bench, I advised
that the "unwarrantable failure" aspect of the c

which should be assessed for that violation, considering th civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 2507449, issued on May 21, 1985, cites a violation of 30 C.F.R. § 75.316, and the cond tion or practice is stated as follows:

> The ventilation and methane and dust control plan was not being followed in the working section in south entries off 2 east off 2 north of main east (ID 0030) in that permanent-type stoppings were not erected up to and including the third connecting crosscut outby the faces between the intake and return as required. There were 3 open crosscuts which had no permanent stopping in them and the faces were driven far enough through the crosscuts.

Section 104(d)(2) Order No. 2507452, issued on May 20, 1985, cites a violation of 30 C.F.R. § 75.400, and the cond tion or practice is stated as follows:

> Loose coal was permitted to accumulate on the floor of the Nos. 1 through 5 entry in the working section in east entries off 4 north (ID 002-0). The coal was from rib to rib and 8 to 14 inches deep. The accumulation was from the faces outby for 50 to 60 feet. In the feeder entry the coal was accumulated from the face to the feeder (120 feet).

Petitioner's Testimony

MSHA Inspector Louis W. Stanley testified as to his ba ground and experience, and he confirmed that he inapected t mine on May 16, 1985, and issued the order in question. He stated that he inspected the return side of the number thre unit and found that permanent type stoppings had not been erected up to and including the third connecting crosscut

Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.

3. Commission Rules, 20 C.F.R. § 2700.1 et

Stipulations

The parties stipulated that at all times re
this case, the overall coal production for the r
operating company was 5,020,840 tons, and that t
for the Pyro No. 9 William Station Mine was 2,04

The parties stipulated that the payment of
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Procedural Ruling

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the order in this case was issued.

Petitioner's counsel asserted that since th
order of May 9, 1985, has been contested by the
he was unclear as to whether or not the validity
order had to be first established in order to su
order issued by Inspector Stanley on May 21, 198

In a ruling made from the bench, I advised
that the "unwarrantable failure" aspect of the o

issue to be determined in a civil penalty case, and the validity of the preceding underlying order is irrele- The parties were advised that the issue here is whether a violation of mandatory standard section 75.316, has established, and if so, the appropriate civil penalty should be assessed for that violation, considering the penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 2507449, issued on May 21, cites a violation of 30 C.F.R. § 75.316, and the condi- or practice is stated as follows:

> The ventilation and methane and dust con- trol plan was not being followed in the work- ing section in south entries off 2 east off 2 north of main east (ID 0030) in that permanent-type stoppings were not erected up to and including the third connecting crosscut outby the faces between the intake and return as required. There were 3 open crosscuts which had no permanent stopping in them and the faces were driven far enough through the crosscuts.

Section 104(d)(2) Order No. 2507452, issued on May 20, cites a violation of 30 C.F.R. § 75.400, and the condi- or practice is stated as follows:

> Loose coal was permitted to accumulate on the floor of the Nos. 1 through 5 entry in the working section in east entries off 4 north (ID 002-0). The coal was from rib to rib and 8 to 14 inches deep. The accumulation was from the faces outby for 50 to 60 feet. In the feeder entry the coal was accumulated from the face to the feeder (120 feet).

ioner's Testimony

MSHA Inspector Louis W. Stanley testified as to his back- d and experience, and he confirmed that he inspected the on May 16, 1985, and issued the order in question. He d that he inspected the return side of the number three and found that pe manent type stoppings had not been

ventilation and methane and dust-control plan, and
P-17 as a sketch of the area where the violation o
He testified that he found a line curtain installe
permanent stopping should have been erected, and h
that he discussed the violation with Mr. Doug Harr
respondent's safety representative who was with hi
the inspection (Tr. 192-197).

Mr. Stanley testified that the section forema
that he was aware of the fact that the required st
not been installed and advised him that men had be
to obtain material to build the stoppings. Mr. St
no evidence of any construction taking place, and
four or five men on the section. The section was
tional mining section, and coal was drilled, shot,
loaded out. When Mr. Stanley arrived on the secti
power was on all of the equipment, and a loading m
coal drill were at the face, and a cutting machine
Although someone advised him that no work had been
morning, the section foreman admitted that coal ha
at one place in the number four entry. Mr. Stanle
that he found 2.4 percent methane in the number fo
and issued a section 107(a) imminent danger order
the methane. The methane was cleared up after a c
hung across the last open break through and into t
four entry (Tr. 200).

Mr. Stanley stated that he issued the unwarra
ure order because of the admission by the section
that an entire shift had been worked without insta
required permanent stoppings. He confirmed this b
that the face had been advanced past the third cro
coal had been removed from these areas inby the la
crosscut (Tr. 201). The reason for requiring the
is to insure positive air ventilation at the faces
prevent curtains being torn down, thereby short c
the air. Failure to maintain proper ventilation w
methane and coal dust to accumulate, thereby prese
hazard of an ignition or explosion (Tr. 201-203).

Mr. Stanley confirmed that he did not conside
tion to be "significant and substantial" because
ings indicated a sufficient quantity of air preser
area and he did not believe that an accident was
203). He confirmed that coal had been mined on th
s i t and he did so by checking the onshift rip

en mined during the previous shift and that the mine
n admitted that had he not appeared on the scene coal
nave continued to be mined and the stoppings would have
onstructed on the intake. Mr. Stanley also determined
oal had been extracted from the last open crosscut inby
distance of 50 to 60 feet, and he confirmed that
rcent methane is not within an explosive range (Tr.
1). He confirmed that only one required stopping had
en constructed, and he identified the location by plac-
"X" on his sketch (exhibit P-17) (Tr. 213).

r. Stanley identified a previous citation he issued at
ne on March 5, 1985, citing a violation of section
, for a missing brattice and he explained why he consid-
nat one to be "S&S," and the one in issue in this case
unwarrantable (Tr. 213-215).

dent's Testimony

avid Winebarger, respondent's Director of Support, iden-
exhibit R-2 as a sketch of the operating unit as it
ed on the day the violation was issued. He stated that
lt was installed that same morning, and confirmed that
ne brattices shown on the sketch were required to be
led on the return when there are three open breaks. He
onfirmed that there were no permanent brattices on the
up to the loading point, and that five or seven brat-
nad to be installed that day. He stated that no coal
en loaded up to the time Inspector Stanley arrived on
ene, but that power was on the equipment, and adequate
s present across the last open crosscut. The belt was
g in order to load out coal which needed to be cleaned
e indicated that he ordered the crew not to run coal
the brattices were installed, and also instructed them
ld seven brattices (Tr. 217-224).

n cross-examination, Mr. Winebarger stated that Inspec-
anley arrived on the unit after he (Winebarger) had
here and that he informed Mr. Stanley that coal was not
run and that he intended to install the brattices.
nebarger testified as to the activities taking place
efore and after Mr. Stanley's arrival (Tr. 224-229).

tion of the plan. However, he took the position that as lon as coal is not being mined, there is no requirement for the stoppings. He argued that since no coal had been mined imme diately prior to the arrival of Inspector Stanley, the respo dent was not required to construct the stoppings. He also argued that construction of the stopping could not take plac while coal was being mined because this would violate the plan, but he conceded that the stopping was required to be constructed before the start of any coal production (Tr. 231-232).

When asked to explan his position that a stopping is no required unless coal is being produced, respondent's represe tative referred to Paragraph A, pg. 1 of the plan (Tr. 232). The plan provision in question, exhibit P-9, provides as follows: "Permanent stoppings shall be maintained up to and including the third crosscut outby the face on the return side and up to the loading point on the intake side."

Mr. Winebarger was asked to point out the plan provisio that provided for the construction of stoppings only when coal was being mined, and he responded "I don't know" (Tr. 237). Mr. Winebarger stated that coal was last produced on the unit on the 4:00 p.m. to 12:00 shift on May 20, 1985, th day before the citation was issued, and on the midnight shif of May 21, 1985 (Tr. 234). Although the morning shift from 7:00 a.m. to 5:00 p.m. on May 21, was a production shift, Mr. Winebarger insisted that no coal was produced, but he confirmed that at 8:50 a.m., work was being performed on the unit, including the cleaning up and loading out of coal by means of the belt, a loader, and shuttle cars (Tr. 235-236).

Respondent's representative stated that three crosscuts were mined several days prior to the issuance of the viola- tion, and that the last one was opened up during the second night shift prior to the inspector's arrival on the scene. He conceded that the opening of these crosscuts constituted the mining of coal (Tr. 238), but believed that the stopping was required to be constructed when the crosscut is cleaned up and travelable (Tr. 239).

BY THE COURT: Technically?
tion or realistically that was a violation in his eyes correct.

MR. HILL: Correct.

BY THE COURT: You agree with that.

MR. HILL: That's correct, he wrote it.

BY THE COURT: Given those facts, it was a violation, wasn't it.

MR. HILL: That's correct.

BY THE COURT: You were three crosscuts out by the face and no permanent stopping had been erected.

MR. HILL: Correct.

BY THE COURT: That violates the ventilation plan, doesn't it.

MR. HILL: That's correct.

petitioner's counsel took the postion that when the third crosscut was mined through, it became a crosscut, and that at that point in time the third stopping was required to be constructed. Since it was not constructed when the inspector viewed it, a violation has been established and the fact that coal was not being produced at that precise moment is irrelevant Tr. 240-242).

been opened, but simply cut into, he would not hav
the violation. He confirmed that once he determin
last open crosscut was completed, he then determin
tion of the third crosscut outby the face where th
was required, and when he found that it was not co
as required by the plan, he issued the violation.
stated that the fact that coal was not being mined
vant, and he believed that the respondent raised t
only to support its contention that it intended to
the stopping in question (Tr. 264-265). In his op
the respondent intended to construct the stopping,
required materials would have been present and it
been constructed when the crosscut was opened up.
the respondent ran the previous production shift f
five cuts of coal without the stopping being const
violation of the plan during the previous shift (T

After careful consideration of all of the tes
evidence adduced in this case, I conclude and find
petitioner has established by a preponderance of t
that the failure by the respondent to construct th
in question constituted a violation of the require
its approved ventilation and methane and dust-cont
It is clear that the stopping up to and including
connecting crosscut outby the faces between the in
return was not constructed as required by the plan
respondent conceded that this was the case. A vic
the requirements of the plan constitutes a violati
tory safety standard 30 C.F.R. § 75.316 as charged
order issued by Inspector Stanley.

I find nothing in the plan to support the res
contention that the active mining of coal has to b
place before the stopping requirements come into p
this defense is REJECTED. The evidence establishe
the time the inspector arrived at the scene, coal
produced on the immediate preceding shift, the cri
cut had been completely mined through and develope
was taking place on the unit when the inspector vi
violative conditions, including the loading out of
the belt and with the use of shuttle cars and a lo
that point in time, the plan required the stopping
tion to be completed and in place. Under all of t
stances, the violation IS AFFIRMED.

tion and admits that it occurred as alleged by the inspecto
(Tr. 8). Respondent requested that it be permitted to pay
the full amount of the proposed civil penalty assessment ma
by MSHA for the violation, and the petitioner's counsel
agreed to this proposed disposition. The respondent agreed
to the negligence and gravity findings made by the inspecto
at the time the order was issued. Under the circumstances,
considered the matter as a joint settlement proposal pursua
to Commission Rule 30, 29 C.F.R. § 2700.30, and after consi
eration of the six statutory criteria found in section 110(
of the Act, the settlement was approved from the bench and
is herein reaffirmed.

History of Prior Violations

Exhibit P-2 is a computer print-out summarizing the
respondent's compliance record for the period June 4, 1983
through June 3, 1985. That record reflects that the respon
dent paid civil penalty assessment totalling $93,693 for 91
violations. Eighty-three of these prior violations were fo
violation of mandatory safety section 75.316, and 187 are f
violations of section 75.400. In addition, exhibit P-1, wh
is a computer print-out of the respondent's compliance reco
for the period January 1, 1983 through January 6, 1985,
reflects six additional violations which occurred within
2 years of the violations issued in this case, two of which
are for violations of section 75.316, and one for a violati
of section 75.400.

Taking into account the size of this respondent, I do
not consider the respondent's history of compliance to be a
particularly good one, and I believe that the respondent ne
to pay closer attention to its coal accumulations cleanup p
cedures and the requirements of its ventilation and methane
and dust control plans. I have taken the respondent's comp
ance record into account in the civil penalty assessments m
for the violations in question.

Size of Business and Effect of Civil Penalties on the
Respondent's Ability to Continue in Business

The parties have stipulated as to the scope of the
respondent's mining operations and agreed that the payment
civil penalties will not adversely affect the respondent's

The parties stipulated that all of the conditions and practices cited as violations in this case were corrected in good faith by the respondent within the time fixed by the inspectors. I agree and conclude that the respondent exercized good faith in abating the violations.

Negligence

With regard to Order No. 2507449, I conclude and find that the respondent knew or should have known of the stopping requirements of its own ventilation plan, and that its failure to construct the required stopping before the inspector found the violative condition is the result of its failure to exercise reasonable care.

Gravity

With regard to Order No. 2507449, I conclude and find that the failure of the respondent to construct the stopping in question was a serious violation. Although the inspector found an adequate supply of air on the unit, the failure to install the stopping presented the possibility of improper ventilation in the unit, thereby contributing to a possible ignition or explosion hazard.

Penalty Assessments

Respondent has agreed to pay the full $1,000 assessment for Order No. 2507452, issued on May 30, 1985, for a violation of 30 C.F.R. § 75.400.

On the basis of the foregoing findings and conclusions with respect to Order No. 2507449, issued on May [illegible], 1985, for a violation of 30 C.F.R. § 75.316, respondent is assessed a civil penalty in the amount of $975.

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date

George A. Koutras
Administrative Law Judge

istribution:

homas A. Grooms, Esq., Office of the Solicitor, U.S. epartment of Labor, 280 U.S. Courthouse, 801 Broadway, ashville, TN 37203 (Certified mail)

r. Bruce Hill, Safety Manager, Pyro Mining Company, P.O. ox 267, Sturgis, KY 42459 (Certified Mail)

fb

	:	Docket No. WEST 85-98-RM
v.	:	Citation No. 2358527; 3/2
	:	
SECRETARY OF LABOR,	:	Climax Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION APPROVING WITHDRAWAL

Appearances: Richard W. Manning, Esq., Climax Molybdenum Com
Greenwich, Connecticut,
for Contestant;
Robert J. Lesnick, Esq., Office of the Solicito
U.S. Department of Labor, Denver, Colorado,
for Respondent.

Before: Judge Carlson

This contest case was consolidated for hearing with dock
WEST 85-96-RM, WEST 85-97-RM, WEST 85-99-RM, and WEST 85-120-
During the hearing, the parties presented extensive evidence
cerning WEST 85-98-RM. Before the presentations were complet
however, the contestant, Climax Molybdenum Company, moved for
leave to withdraw its notice of contest of the single citatio
that docket. The Secretary did not oppose the motion.

Accordingly, Climax's motion is granted. The contest pr
ceeding, docketed as WEST 85-98-RM (citation 2358527), is sev
from those cases with which it was earlier consolidated, and
hereby ORDERED dismissed.

John A. Carlson
Administrative Law Judge

Distribution:

Richard W. Manning, Esq., Climax Molybdenum Company, a divisi
AMAX Inc., One Greenwich Plaza, Greenwich, Connecticut 06836-
(Certified Mail)

CRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 84-98 A. C. No. 33-00968-03568
v.	:	Nelms No. 2 Mine
UGHIOGHENY & OHIO COAL CO., Respondent	:	

DECISION

earances: Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for Petitioner
Robert C. Kota, Esq., St. Clairsville, Ohio, for Respondent

fore: Judge Kennedy

Foreword

Without passing on the sufficiency of the findings of ct and conclusions of law set forth in the bench decision May 31, 1985 as confirmed and incorporated in the final der issued August 8, 1985, 7 FMSHRC 1185, the Commission its order of September 17, 1985, 7 FMSHRC 1335, remanded is matter to the trial judge for issuance of his bench cision as a written decision as required by Rule 65 or suance of a new decision setting forth the trial judge's ndings on all the material issues of fact, law or dis- etion presented by the record.

Thereafter, the trial judge issued an order dated tober 4, 1985, setting forth in a signed writing the ntative bench decision together with his reasons for clining to sit as a board of review on the sufficient of e record made by MSHA in support of its Part 100.5 special sessments. The trial judge found that since the mmission had refused to acquiesce in the proposition that s trial judges are bound by the penalty point formula of

1150-1153 (7th Cir. 1984), rehearing en banc denied July 24 1984; United States Steel Mining Company, Inc. 6 FMSHRC 1148, 3 MSHC 1362 (1984).

Ignoring the fact that (1) the operator's reliance on Allied Products v. FMSHRC, 666 F. 2d 890, 894-896 (5th Cir. 1982) was misplaced, if not frivolous, and (2) that the operator had failed to avail itself of the opportunity to challenge the sufficiency of the trial judge's findings on any other ground, the Commission refused to treat the written transcript of the judge's bench decision, which contained his findings of fact, conclusions of law and the bases therefor, as part of his final order and remanded the matter for the insufficiency of the final order which adopted and confirmed the findings and conclusions set fort in the written transcript of the bench decision.

Accepting the Commission's curious remand in good grace, the trial judge included in his order of October 4, 1985, a direction to the parties to file post-hearing briefs, including their proposed findings of fact, annotate to the record, with respect to the material issues of fact, law and discretion presented by the record. On October 31, 1985, one day before its post-hearing brief was due, counse for the operator filed a second petition for review with th Commission seeking vacation of the trial judge's order to file a post-hearing brief. The only ground asserted was th "futility" of attempting to attack the trial judge's bench decision. On November 1, 1985, the Commission denied Youghiogheny & Ohio's second petition for interlocutory review and thereafter on November 25, 1985, the trial judge issued an order to show cause why counsel's failure and refusal to file a post-hearing brief should not be deemed a default and a summary order entered assessing as final the penalties assessed in the bench decision of May 31, 1984. Counsel for Youghiogheny & Ohio made no response and offere no execuse for his contemptuous refusal to file a post-hearing brief.

The premises considered, therefore, it is ORDERED that the operator be, and hereby is, determined to be in DEFAULT It is FURTHER ORDERED that the penalties assessed in my decision of May 31, 1985 as adopted and confirmed in my final order of August 8, and my supplemental order of

the reasons set forth in the findings and conclusions contained in the written transcript of my bench decision of May 31 as adopted and confirmed in my final order of August 8, 1985 and reiterated in my supplemental order of October 4, 1985.

Under section 557(c) of the APA and Commission Rule 65 a judge's decision must be in writing and must "include findings of fact, conclusions of law, and the reasons and bases for them, on all the material issues of fact, law or discretion presented by the record." The written transcript of May 31, 1985 and my supplemental order of October 4, 1985 both set forth in writing the findings, conclusions and reasons in support of my penalty assessments, including (1) the fact of violation, which in each instance was never disputed, and (2) the six statutory criteria which, except for gravity and negligence, were the subject of stipulations and/or undisputed documentary evidence.

In Sellersburg Stone, supra, the court held that a judge's decision complies with the APA and Rule 65 if it considers a contention and discusses it, whether or not the judge makes a specific finding on it. Further, the court held that the Commission should not overturn or remand a case if the judge's position on a contention is "reasonably to be discerned." Indeed, the court commended to the Commission the practice of modifing a judge's decision to include undisputed record evidence. In Sellersburg the Commission did this as to four of the statutory criteria on which the judge had made no findings. The undisputed record evidence here showed that Youghiogheny & Ohio is a medium sized coal operator and that its ability to continue in business would not be impaired by any penalty found appropriate. The other four criteria (1) prompt abatement, (2) gravity, (3) negligence and (4) history of prior violations are all set forth in the findings, conclusions, and discussion of the tentative bench decision which the operator declined the opportunity to challenge. What more the Commission may want is impossible for me to discern at this time.

To insure compliance with the order of remand and because the circumstances of this case provide a unique

For years, ventilation has been a problem at th
#2. More specifically, between March 14, 1982 and M
1984, the mine was cited for 83 ventilation violatio
an average of 3.5 violations a month. If the violat
found by the UMWA safety committeemen were included
would be even higher. Despite the dangerous pattern
lished, 87 percent or 72 of the cited violations wer
allegedly harmless and assessed single penalties of
Ten others were assessed penalties that averaged app
mately $100 and one was vacated.

Ventilation problems continued throughout 1984
to the time of the hearing in May 1985. In the area
are the subject of this case, this was principally d
the fact that the sections being developed were almo
mile, 4,000 feet, from the main air shaft and becaus
air had to travel over or around many obstacles and
tions to reach the working faces. A new air shaft w
construction but its completion was not expected unt
1985 or early 1986. Because MSHA had been tolerant
problem and the Union had not pressed the matter, mo
approximately 90 percent, of the violations were tre
minor and insignificant.

It came as a distinct shock therefore that with
period of less than 30 days MSHA suddenly decided to
enforcement and specially assess the recirculation v
tions that occurred on March 14, and April 5, 1985.
over this crackdown, Youghiogheny & Ohio took both c
to conference. When the district manager held fast
refused to rescind or vacate his staff's recommendat
special assessments and when they were later assesse
total of $1,800 Youghiogheny & Ohio filed a notice c
contest.

Youghiogheny & Ohio admitted the existence of h
lations. Its contest was bottomed on the claim that
the violations were not serious the special assessme
mination was clearly erroneous and the amounts asses
excessive, arbitrary, capricious and an abuse of dis
Citing Allied Products v. FMSHRC, supra, counsel for
operator insisted that the penalties were assessed e
ously because the District and Assessment Offices fa
make the findings required by Part 100 or that such

es exercise their independent judgment in applying the criteria and are in no way bound by the determinations by MSHA.

More specifically, however, the operator's challenge to the time allowed for abatement of Citation #2203748; ts special assessment since the inspector had initially acterized it as non-S&S; and, most importantly, to the ling that a special assessment was warranted because of agement's negligent failure to prevent a recurring recir- ation problem in the northern sections of the mine. aing causes management to send its legal gladiators into adversarial arena faster or with greater forensic feroc- than a finding that top management was guilty of igence, especially a "high" degree of negligence, with pect to a safety violation.

Cognizant of the sensitivity of this issue, the ission early on decided to assiduously avoid making find- s as to the degree of management's culpability. Penn gh Coal Co., Inc., 4 FMSHRC 1224, 1127, 2 MSHC 1781, 3; Monterey Coal Company, 7 FMSHRC 996, 1002, 3 MSHC 3, 1836 (1985). This refusal to "quantify the degree of operator's negligence," no matter how great, tends to fy violations in a way that is contrary to the intent of gress.

With respect to Citation #2327363, issued April 5, 1985, operator specifically challenged the findings of negli- ce, gravity, S&S, and the alleged failure to give it the percent discount allowable for prompt abatement. Finally re was the bold assertion, summarily denied, that despite record made at the hearing the judge must remand the ter to the Assessment Office for reassessment because the rative findings were not in accord with Part 100.5.

The Youghiogheny & Ohio Coal Company

Youghiogheny & Ohio, a subsidiary of Panhandle Eastern poration, is a medium sized coal operator with production approximately 900,000 tons of bituminous coal a year. home office is in St. Clairsville, Ohio. The Nelms #2 e is located in Hopedale, Harrison County, Ohio. It is only mine operated by Youghiogheny & Ohio. At the time

in business.

Walking the 013 Section

Because of recurring complaints and problems with recirculation of return air in the northern part of th Nelms #2 Mine, two MSHA inspectors, Robert Cerena, a v tion specialist, and Mark Eslinger, a supervisory mini engineer and ventilation expert, were sent to make a v tion technical inspection of the mine on March 14, 198 Both worked out of District 8 in Vincennes, Indiana. were experienced underground coal mine inspectors.

Cerena and Eslinger arrived at the mine at 0745 h and at 0800 hours, went underground accompanied by Lar Ward, a UMWA safety committeeman, and Lawrence (Ozzie) a member of Youghiogheny & Ohio's safety compliance st The four men traveled to the 013 section. The inspect picked this section because recirculation citations ha written on this section in January and February. Nine miners worked the section with a continuous mining uni Other electrically energized machinery on the section sisted of ram cars, a roof bolting machine, a battery powered scoop, and an auxiliary ventilation fan.

The inspection party approached the face area thr the "A" entry. Mr. Wehr testified the mathane reading the working face was one to two tenths of one percent, within safe limits. The mine emitted 1.5 million cubi of methane every 24 hours which put it in the category gassy mine with a pervasive extrahazardous condition. party then proceeded through the last open crosscut to "B" entry. In the "B" entry Cerena found a ram car wi permissibility violation. After the citation for the permissibility violation was abated, the party inspect face of the "B" entry where a continuous miner was pro coal in the last crosscut to the left off the "B" entr Exhaust tubing was installed on the right rib. The tu extended from the working face down the right rib and the "B" entry into the last open crosscut between the and "C" entries. At this point the exhaust tubing was attached to an auxiliary fan.

Intake air which came down the "A" entry became r air once it swept across the working face. The return was then exhausted through the last open crosscut, the

in the "C" entry the inspectors and the others observed perceptible amounts of float coal dust in the "C" entry. At the first man door along the return stoppings Cerena made a smoke tube test and confirmed that return air was coming through the cracks in the man door. This air was then being drawn up the "C" entry to the check curtain and diverted through the second crosscut (8 plus 28) outby the face area and drawn up the "B" entry where it was recirculating across the working face to be vented out the tubing through the auxiliary fan and once again into the return.

At this time, 1015 hours, Cerena advised the section foreman, Clifford Bolen, that a recirculation condition existed for which a citation would be written. Since no methane was detected in the "C" entry or along the stopping line, Cerena, following standing instructions, permitted coal production to continue and considered the violation not reasonable likely to result in a serious injury or illness if abated within the time set, 1215 hours. Because this was the third recirculation violation cited in as many months and others had been reported on this and other sections, Eslinger and Cerena believed management should have been more alert to discover the problem, had failed to exercise the high degree of care imposed by the Mine Act, and could point to no mitigating circumstance. They also believed that if the hazards against which the standard is directed occurred they could result in permanently disabling injuries.

Because at 1015 hours Cerena and Eslinger were not aware of the total extent of the recirculation and did not consider the condition an immediate hazard they did not press for rapid abatement. They apparently believed that allowing 2 hours and 15 minutes for abatement would permit the section foreman to mesh his production with his abatement effort without undue interruption of production. All the members of the inspection party agreed that abatement should have been accomplished within 45 minutes to 1 hour.

The inspection party continued to walk outby in the "C" entry. Recirculation was discovered again at the next two man doors outby. The man doors were installed at every five crosscuts along the stopping line. Thus, the recirculation problem extended over an area of 10 or more crosscuts outby the last open crosscut along the stopping line.

mined to be filtering through all three man doors and some of the permanent stoppings. It was steadily accumulating on the surface of the rock dust. Because the standard prohibits "any recirculation of air at any time," neither Eslinger nor Cerena nor the operator made any attempt to measure the actual volume or velocity of air recirculating. 30 C.F.R. 75.302-4(a). Eslinger, when pressed, estimated the volume at up to 3,000 cfm which would be approximately half the amount of air, 6,700 cfm the operator's engineer calculated to be sweeping the working face.

The estimate of the amount of air recirculating seems reasonable, because, as the inspection party later discovered, return air was also recirculating over two battery charging stations in the "C" entry at the 3 plus 50 station. The air vents for the battery chargers measured 8 x 8 or 9 x 9 inches. It is obvious that a considerable volume of air could recirculate through these large vents. A citation was written for this condition because impermissible battery chargers located on intake air must be ventilated through return air vents to remove any hydrogen gas fumes and to preclude the circulation of any noxious gases, including carbon monoxide, to the face area in the event of a fire or explosion. Overall Cerena estimated the area affected by recirculation extended from the working face in the "B" entry across the other two face areas and down the "D" entry outby and back to the working face for a distance of approximately 1,300 feet.

The inspection party completed its observations and returned to the face area around 1100 hours. At that time, they found that Bolen, the section foreman had been unsuccessful in his attempts to abate the recirculation. Bolen said he first tightened the check curtain in the "C" entry and when this did not help installed a tail tube on the exhaust end of the auxiliary fan and extended it down the crosscut into the return. The effort was designed to reduce the auxiliary fan pressure and keep it from overriding the mine pressure. At the time, the intake air was measured at 14,000 cfm and the return at 19,800 cfm.

As Eslinger pointed out, a system wide deficiency in the amount of air available to the section markedly contributed to the problem. This had been corrected previously by adjusting the regulators so as to rob air from one section to make up for a deficiency in another. This is a temporary

minute was "robbing" or short circuiting intake air from the "B" and "C" entries. This created a negative air pressure or vacuum along the return stoppings line of the "D" or return entry. As Eslinger explained:

> ". . . there was a higher pressure in the return entry, which is the "D" entry than the "C" entry and what was causing the higher pressure in the "D" entry than the "C" entry was due to the velocity pressure or the velocity of the air exiting from the fan. Okay.
>
> That pressure created a higher pressure in the "D" entry than the "C" entry; therefore air flows from a high pressure to a low pressure, it was flowing from the "D" entry to the "C" entry. Once back in the "C" entry, the fan was wanting air and, therefore, it was drawing it from the "B" entry. Well, air that's in the "C" entry fills into the "B" entry and, therefore, part of the [recirculated] air was going back through the tubing." Tr. 157.

Wehr pitched in trying to help Bolen. The fan was repositioned and the tail tubing changed twice. All curtains were tightened and curtains were hung in the crosscuts where the return air was leaking through the man doors. But nothing seemed to work. Bolen believed he asked Cerena if he could suggest a solution. Cerena said he was not asked but that in any event he would not have known of a solution. Eslinger, the most expert of all present, said he was never asked for a suggestion and did not believe he should volunteer. Operators, of course, are rightly jealous of their perogative of managing their mines. An inspector who volunteers a plan of abatement can find himself compromised if the plan does not work. Since the section was reasonably clean, dry and rock dusted and the methane readings remained within a safe tolerance there was no reason, the inspectors believed, not to permit the abatement effort to proceed as the operator saw fit.

For reasons not disclosed by the record, the section foreman did not seek assistance from his shift foreman. He said he was not authorized to contact anyone else. Finally, when the abatement time expired, the section foreman advised Eslinger and Cerena he had exhausted his knowledge and resources and had given up trying to abate the condition. At this point the inspectors ordered the only thing they

apparently communicated the problem to the mine foreman and the mine superintendent.

Shortly thereafter the mine foreman and superintendent arrived on the section. Mr. Wurschum, the mine superintendent and a former MSHA inspector, immediately recognized that the recirculation problem was resulting from the venturi effect of the auxiliary fan. He had discussed such a problem with Mr. Jay Haden of MSHA's district office in Pittsburgh in February. Haden told him the solution was to install baffle curtains between the exhaust end of the fan and the return entry to deflect and slow the velocity and negative pressure on the air along the stopping line. With this done, the recirculation abated and the closure order, written at 1230 hours, was conditionally terminated at 1330 hours. The conditional termination allowed production to resume pending an evaluation of the adequacy of the operator's ventilation plan for the entire section. This evaluation never occurred as the operator idled the section on March 16, 1984 and the order was terminated unconditionally on April 4, 1984.

Negligence

I find the mine superintendent was negligent in failing to pass on to the section foreman and his safety compliance staff the information given him in February by Mr. Haden of MSHA. Both Bolen and Wehr testified they had never been told that baffle curtains could be used to decrease the negative pressure caused by an auxiliary fan. In view of the number and frequency of citations and complaints of ventilation problems, including recirculation problems, the mine superintendent should have promptly disseminated all the corrective action information available to him and directed the holding of training sessions to insure section foreman and other line personnel were capable of detecting, recognizing, and abating hazardous recirculation conditions.

Mr. Ingold, the operator's mine engineer, indicated Mr. Wurschum sought a solution to localized negative pressure problems because the condition was fairly pervasive in the mine. He further stated that as of the time of the hearing the operator was still experiencing problems with diffusing the pressure from its auxiliary fans and building baffles on its fans to diffuse the pressure on its return

Gravity

The operator claims the inspector's evaluation of the violation as non-S&S and the gravity as "unlikely" as of th time it was discovered, 1015 hours, is conclusive of the fact that the violation was not serious, indeed was harmless, and any penalty in excess of $20 unwarranted.

This, of course, is nonsense, but dangerous nonsense because it finds support in MSHA's practice of treating violations that do not pose an immediate or imminent danger as insignificant and insubstantial. Both inspectors testified they initially considered the recirculation condition a non-S&S violation because the concentration of methane, one to two tenths of one percent, was well within safe limits. Both realized, of course, that if normal mining operations continued, as they did, and the condition remained unabated, as it did, it could make a significant and substantial contribution to a mine fire or explosion. What MSHA's training apparently overlooks is the provision of the law that makes even a nonserious or seemingly harmless conditions S&S if, as must be assumed, mining operations were to continue with the condition ignored or undiscovered and unabated.

Thus, despite the fact that the citation in question reflected the inspectors' belief that if unabated the condi tion "could reasonably be expected" to result in "permanent disabling" injuries to the nine miners working on the section, the controlling finding, absent the closure order, in far as the penalty assessment was concerned was the erroneo non-S&S finding.

Many violations, considered in isolation, are not serious in the sense that they present no immediate or imminent danger of a permanently disabling or fatal injury. But that does not mean that, if not detected and abated, they could not in the course of continued mining operation "significantly and substantial contribute to the cause and effect of a mine safety or health hazard." The Commission has made clear that if a violation is of such a nature as t create a recognizable health or safety hazard that in the course of continued mining operations could reasonable be expected to contribute to a serious injury or fatality it should be classified as S&S, regardless of the seriousness

the probable consequences of the continued existence of the violation under normal mining operations, without any assumptions as to the time of abatement. In other words, for a violation to be deemed significant and substantial, S&S, it need not be one. The sole requirement is that its "contribution" be S&S. United States Mining Co., Inc. 7 FMSHRC 1125, 1129, 3 MSHC 1871, 1872 (1985).

The corollary of this interpretation is that an operator is entitled to mitigation for prompt abatement but not for getting caught. An operator is not to be accorded leniency because the inspector found the violation before it made a possibly lethal contribution to a fatal hazard but only to consideration for moving quickly and effectively to abate the condition found and cited. United States Steel Mining Co., Inc., supra 7 FMSHC 1130, 3 MSHC 1974.

The passage of time and the failure to abate while mining operations continued increased the inspectors' apprehension over what at first blush and under the erroneous standard applied appeared to be an inconsquential violation. At 1215 hours, Cerena and Eslinger reevaluated the situation and, as noted, at 1230 hours issued a 104(b) closure order. This, of course, guaranteed the safety of the section until the condition was corrected and the order terminated. It also had the effect of superseding the non-S&S finding and making the violations immediately eligible for a regular or special assessment. 30 C.F.R. 100.4. Counsel apparently overlooked the fact that one of the circumstance that justifies special assessment of a citation designated as non-S&S is the failure to abate the condition cited within the time set by the inspector.

Belatedly, if inadvertently, sensing this hole in its non-S&S defense to the amount of the penalty, the operator asserted but never proved that the time allowed for abatement was unreasonable and the issuance of the closure order arbitrary, capricious and unwarranted. To the contrary, neither the mine superintendent nor the mine foreman protested issuance of the closure order and both the section foreman and the operator's walkaround, Mr. Wehr, testified that in their opinion the time for abatement was reasonable and issuance of the closure order proper.

single penalty enforcement scheme and meaningful enforcement. The comparison in reaction was not unlike that which Mark Twain made between lightning and lightning bug. The mine superintendent, who almost never appeared underground, and the mine foreman appeared on the scene within a very short period of time and quickly directed installation of the three baffle curtains. By 1330 hours the curtains had been installed, the fan restarted and the air along the return stoppings tested to show that the pressure was now positive from the intake to the return.

Inspector Eslinger remarked upon the aclarity with which top management gave its time and attention to the condition after the closure order issued. While he considered the means adopted a mere "band-aid" upon a problem endemic to the operator's entire ventilation system, he believed the closure order much more "attention getting" than allowing the operator to "eat $20 penalties" indefinitely while largely ignoring the gravity of the systemic problem.

The operator's history of prior violations shows that during the 2-year period March 1982 to March 1984 only 92 out of 552 violations were designatd S&S. In other words, for 83 percent of the violations cited during this period the operator got off with a $20 penalty. As noted, during this same period the operator was cited for 83 ventilation violations 87 percent of which were designated non-S&S and assessed only $20. Of these 83 violations 9 involved recirculation problems 7 or 75 percent of which were designated non-S&S and assessed at $20. At least five additional recirculation violations occurred in 1984, only one of which was designated S&S. A recirculation violation was also cited on February 5, 1985. The record shows no further specifics but the testimony by Mr. Ward, the Union safety committeeman, indicated recirculation violations were frequent and expected to continue until the new air shaft was completed.

As Inspector Eslinger noted the ease with which operators "eat" $20 penalties shows it is not a credible deterrent. When coupled with MSHA's misapplication of the non-S&S designation, enforcement becomes a largely trivial pursuit. Top management was well aware of the ventilation problem in the northern sections of the mine. But top management also knew it was more cost effective to just pay

The recirculation ceased when the baffle curta
installed. These curtains were available to the se
foreman but he had never been trained in their use.
ment's failure to train the section foreman in the
this device for abating a serious reciculation prob
negligence clearly and directly imputable to the mi
intendent. It measureably increased the gravity of
violation as every hour of delay in abatement measu
contributed to the risk of a major mine hazard.

On gravity, therefore, I find that by the time
closure order issued the likeihood of a major mine
mining operations continued was high and the severi
consequences for the nine miners, two inspectors, a
walkarounds serious to extreme.

The Special Assessment

The operator's attack on the MSHA's special as
procedures is without merit. The Commission has re
held that the procedures by which penalty assessmer
proposed by the Secretary of Labor are irrelevant a
immaterial to a penalty assessment by the Commissio
trial judges. Black Diamond Coal Company, 7 FMSHRC
1121-1122, 3 MSHC 1889, 1892-1893 (1985). Had cou
his homework he would have known that his reliance
Products Company v. FMSHRC 666 F. 2d 890 (5th Cir.
misplaced. As the court pointed out in Sellersburg
Company v. FMSHRC, 736 F. 2d 1147, 1152 (7th Cir.
rehearing en banc denied, the reasonableness of pe
assessed in Commission penalty proceedings are not
by the penalty point formula set forth in Part 100
in passing, however, that a special assessment in
of $850 for a ventilation violation that significa
substantially contributed to hazards similar to th
involved in this violation was made and upheld in
Coal Company, 7 FMSHRC 996, 999, 3 MSHC 1833, 1834

The violation in this case was S&S. In addit
closure order was necessary to get sufficient atte
top management to bring about abatement. Short of
closure order there was no way to do this. By 123
the inspectors knew they had a serious problem on
hands, especially since the section foreman stated
exhausted his resources for abating the condition.
point, and to their credit, Cerena and Eslinger co

". . . the frequency of occurrence . . . was probably the key factor . . . the fact that it was a reoccuring problem that seemed to be happening again and again and only band-aid type solutions were being applied to it." Tr. 165.

On March 29, 1984, Eslinger wrote a memorandum to the District Manager in which he made an independent evaluation of the violation and concluded that to overcome the operator's "reluctance" to provide sufficient intake air and encourge compliance a special civil penalty assessment was in order.

My only disagreement with the inspectors is over the degree of the operator's culpability. They found "high" negligence. I find the operator's failure to provide the necessary preventive training and instruction to the section foreman when, as the record shows, the mine superintendent was possessed of that information demonstrated a reckless disregard for safety that warrants an increase in the penalty from $850 to $1,000.

Walking the 021 Section

Three weeks later, on the morning of April 5, 1984, Inspector Cerena accompanied by a union walkaround and company escort, made another ventilation technical inspection in the 021 section of the Nelms #2 Mine. The undisputed facts show the inspector found a recirculation violation that involved the last open crosscut and two crosscuts outby in the "B" entry involving an area of about 300 feet. The recirculation resulted from the removal of a tail tube from the auxiliary fan. The methane reading at the working face was .5 percent. Recently an outburst of 1.8 percent had occurred.

The inspector issued a 104(a), S&S citation because he believed the potential for a methane buildup was reasonably likely if mining operations continued and therefore the condition could significant and substantially contribute to the hazard of a mine fire or explosion. He also believed the amount of float coal dust in suspension presented a respirable dust hazard that could significantly and substantially affect the health of miners working or traveling in the area.

tube; and that the mine superintendent was "highly" negligent in failing to instruct and train the section foreman in the use of baffle curtains to diffuse the venturi effect caused by the high velocity of air coming from the exhaust fan.

Because this was the fourth occurrence of a serious recirculation violation in as many months, and followed closely after the closure order issued on March 14, Inspector Eslinger recommended the violation be specially assessed. In his judgment the mine superintendent was highly negligent in failing to give his ventilation problems the time and attention they deserved; was applying only band-aid remedies to a systemic problem of considerable magnitude; and had aggravated the problem by his failure to train and instruct his section foreman in the use of baffle curtains to relieve the negative pressure created by use of high velocity auxiliary fans.

The operator admitted the violation but claimed the special assessment, $950, was, in view of mitigating circumstances, excessive. The record shows the condition was timely, but not rapidly, abated only because the inspector told the foreman to use baffle curtains. Counsel failed to prove the existence of any mitigating circumstances.

I find the preponderant evidence supports the inspector's finding that the violation was serious and could significantly and substantially contribute to a mine health or safety hazard.

Gravity and Negligence

With respect to the special finding, the record shows the hazards associated with inadequate ventilation, of which recirculation is a symptom, are among the most serious encountered by the mining industry. A basic reason for the total prohibition on recirculation of return air is the danger of an ignition of an explosive concentration of methane, either alone or mixed with coal dust, liberated at the face during mining operations. When coal is freshly cut, methane can be liberated in dangerous amounts in short periods of time. Although methane itself becomes explosive at a 5 percent concentration, even a smaller percentage concentration of the gas mixed with float coal dust can enerate an explosion. Cri kmer a d Ze er ( ). Elements

Sess. 41 (1977). The Nelms #2 is a gassy mine that liberates excessive amounts of methane and is under the extrahazardous inspection cycle required by section 103(i). The citation was issued at a working face where coal was being cut. The discrete hazard contributed to by the recirculation of return air was a potential buildup at the face of methane and coal dust that could result in a possible methane ignition or that could propogate a dust explosion.

I further find that if the hazards contributed to occurred it was reasonably likely that one or more miners would suffer fatal or disabling injuries. As the inspector testified, methane in an explosive concentration could have been liberated at any time and with the turbulence caused by the recirculation could have achieved an explosive concentration within a relatively short time. The continuous mining machine, the operation of which may cause arcing and sparking, was a ready and potential source of ignition. I conclude MSHA carried its burden of showing a discrete safety hazard contributed to by the violation, namely the possible accumulation of mathane and coal dust in the presence of a potential ignition source.

Finally, I find the inaction of the mine superintendent in the face of the recurring recirculation problems at the Nelms #2 demonstrated a reckless disregard for the safety of the miners. Indeed, management of the Nelms #2 developed a pattern of ventilation violations which fully warranted application of the sanctions provided in section 104(e) of the Mine Act. As the Senate Committee Report observed, "The existence of such a pattern should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient." Sen. Rep., 95-181, 33 (1977).

Under section 104(e) of the Act, the Secretary of Labor was authorized to issue a pattern of violations notice to a mine operator if the mine showed a pattern of S&S violations Congress established this provision to address the problem of mine operators who have recurring violations of health and safety standards. The principle expressed was that a 104(e) pattern of violations notice should be available as

the same mine hazards to occur again and again wit
addressing the underlying problems. Id, at 32-33.
describes this case precisely.

Had the sanctions of 104(e) been applied, a p
violations notice would have been issued to Youghi
Ohio long before March 14 or April 5, 1984. Conse
by that time the chronic ventilation deficiency wo
have been abated or 104(e) closure orders would ha
the condition forcefully to the attention of manag

This did not and could not happen because sec
104(e) of the Mine Act is a dead letter. For the
years, since its enactment and through the adminis
of two Presidents, four Secretaries of Labor, and
Assistant Secretaries of Labor for Mine Health and
the Executive Branch's duty to "take care that" se
104(e) "be faithfully executed" and enforced has b
ignored.

After considering the other statutory criteri
forth in my findings and as stipulated to by the p
find the amount of the penalty warranted for this
is $950.

ORDER

To impress upon the operator the need to addr
more urgent and resolute manner chronic problems w
ventilation system at the Nelms #2 Mine it is ORDE
the operator pay the penalties assessed in the tot
of $1,950, on or before Friday, February 21, 1986.

Disciplinary (Rule 80) Reference

Rule 80 of the Commission's rules provide for
imposition of disciplinary sanctions for violation
standards of professional conduct. Except as prov
Rule 80(e), however, a trial judge is required to
matters to the Commission which, by majority vote,
mines whether the circumstances reported warrant d
action. Having carefully reviewed the record in t
matter, I find the following circumstances warrant
reference:

1. Counsel for the operator refused to compl

FMSHRC, supra, as the controlling precedent on the issue of the alleged excessiveness of the penalties, ignoring and failing to distinguish in any way controlling precedent to the contrary.

3. Throughout the trial of this matter, counsel for the operator persisted in badgering the witnesses and the trial judge with the totally erroneous claim that Part 100.3 of the Secretary's penalty assessment formula was controlling of the amount of the penalties properly to be assessed.

4. Throughout the trial of this matter, counsel for the operator persisted in badgering the witnesses and the trial judge with the clearly erroneous claim that MSHA misapplied Part 100.5 when resonable inquiry would have demonstrated that by virtue of issuance of the closure order on March 14, 1984, special assessment of the citation in question was mandated by Part 100.5.

5. Throughout the trial of this matter, counsel for the operator persisted in ignoring controlling precedent on the definition of an S&S violation.

6. Counsel for the operator persisted throughout the trial of this matter in advancing frivolous arguments and claims with respect to both the facts and the law as the findings on the merits demonstrate.

With respect to specification 1, Disciplinary Rule -106 of the Code of Professional Responsibility provides:

"(A) A lawyer shall not disregard . . . a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such . . . ruling."

Despite this clear injunction, counsel for the operator ailed and refused, after denial of his appeal, to comply th the trial judge's order to file his post-hearing pro- osals and brief. While, under appropriate circumstances, t is not uncommon for a party to waive the filing of a

Commission's earlier grant of counsel's appeal from the trial judge's claimed failure to consider the arguments he wished to present in support of his position.

As Ethical Consideration 7-22 notes, "Respect for judicial rulings is essential to the proper administration of justice." By failing to comply with the trial judge's order, counsel not only showed his disrespect for this tribunal but failed in his duty to protect the interests of his client by pressing his argument, if legitimate, that the tentative bench decision was erroneous. If, on the other hand, he had no legitimate argument to present he should have accepted the bench decision and avoided waste of the Commission's time and resources by filing a frivolous appeal. The Preamble to the Code of Professional Responsibility states that the Disciplinary Rules are mandatory in character and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

With respect to specifications 2 through 6:

Rule 1.1 of the Model Rules of Professional Conduct impose a duty of competence on a lawyer that includes a duty to make thorough and adequate preparation for the trial of a matter. The record in this proceeding shows that counsel for the operator failed to make the necessary inquiry and analysis of the factual and legal issues controlling of the outcome with the result that much time, effort, and expense was incurred by both parties and the Commission in disposing of a matter that should never have been contested.

Rule 3.1 of the Model Rules provides that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . ." An action is "frivolous" if it cannot be supported by a "a good faith argument for an extension, modification or reversal of existing law." Counsel for the operator never advanced a legitimate argument for modifying or reversing the law governing the assessment of civil penalties in Commission proceedings. An advocate has a duty to use legal procedure to the fullest benefit of a client's cause, but also a duty not to abuse legal procedure, including the Commission's administrative process. The litigation process may, of

Rule 3.3 of the Model Rules provide that "A lawyer shall not knowingly . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." The record shows that with the exercise of reasonable diligence, as required by Rule 11 of the Federal Rules of Civil Procedure, counsel for the operator should have known that Allied Products, supra, was not controlling precedent in this Commission proceeding.

Under the circumstances presented, the trial judge recommends that if the Commission finds the unprofessional conduct alleged warrants disciplinary action, Robert C. Kota, Esq., a member of the bar of the State of West Virginia, be publicly reprimanded for contempt of the Commission and suspended from practice before the Commission for 6 months.

The premises considered, therefore, it is ORDERED that the actions heretofore specified as violative of the standards of professional conduct by Robert C. Kota, Esq., a member of the bar of the State of West Virginia, be, and hereby are, REFERRED to the Commission pursuant to Rule 80 for such disciplinary action as the Commission deems appropriate.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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Robert C. Kota, Esq., The Youghiogheny & Ohio Coal Co., P. O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

dcp

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Complainant	:	DISCRIMINATION Docket No. CEN Docket No. CEN
v.	:	MD 85-04
EISENMAN CHEMICAL COMPANY, Respondent	:	Corpus Christi

DECISION APPROVING SETTLEMENT

Appearances: Jack F. Ostrander, Esq., Office of Solicitor, U.S. Department of Labo Dallas, Texas, for Complainant
Steven R. Baker, Esq., Houston, Te for Respondent

Before: Judge Maurer

STATEMENT OF THE CASE

This is a consolidated discrimination proce by the complainant against the respondent pursua of the Federal Mine Safety and Health Act of 197 respondent with unlawful discrimination against Gilberto Pena, for exercising certain rights affo the Act. A hearing in this matter was convened Texas on December 18, 1985. At that time the pa me of a proposed settlement disposition of the d

Counsel for the Secretary read the settleme record as follows:

MR. OSTRANDER: Comes now the Secretary of L Complainant, and Eisenman Ch Company, Respondent in the a case, and agree to settle th on the basis of the followin

A. Respondent agrees to pay Com Juan G. Pena, the sum of $13 full and complete satisfacti wages due to Complainant und

B. Secretary agrees to waive a civil penalty in this case upon payment of the sum of $13,000 to Juan G. Pena.

C. the intent of this agreement is to settle all claims Complainant may be due under the provisions of Section 105(c) of the Act.

D. Complainant waives any right to reinstatement and any right to reapply for a position.

E. Eisenman Chemical will remove from the personnel file any references of Juan G. Pena's termination, including the letter of discharge. Such documents and/or references, however, may become a part of any relevant litigation file, and this agreement in no way prejudices Respondent's rights to use any such documents and/or references in any relevant litigation or investigation.

F. Respondent will give Juan G. Pena neutral references in the future.

CONCLUSION

After careful review and consideration of the settlement rms and conditions proposed by the parties in this proceeding, conclude and find that it reflects a reasonable resolution the complaint. Further, since it seems clear to me that all e parties, including Mr. Pena personally, are in accord with e agreed upon disposition of the complaint, I see no reason y it should not be approved.

ORDER

The proposed settlement is APPROVED. Respondent IS ORDERED D DIRECTED to fully comply with the terms of the agreement.

Roy J. Maurer
Administrative Law Judge

Distribution:

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Mr. Juan Gilberto Pena, 2038 Rockford Drive, Corpus Ch
TX 78416 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 85-132 A. C. No. 01-00328-03585
v.	:	Bessie Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENTS
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements the three violations involved in this matter. The originall assessed amounts were $15,000, and the proposed settlements for $9,500.

Order No. 2482343 cites the operator for a violation of C.F.R. § 77.500 because work was performed inside a wall-mou 520-volt, a.c., three-phased switchbox while the box was ene gized and the violation contributed to a fatal accident. An employee was working on energized terminals inside the box w he was electrocuted. Had the box been deenergized and locke out, the accident would not have occurred. A settlement is mended for the original amount of $5,000. I approve this settlement.

Citation No. 2483515 cites the operator for a violation 30 C.F.R. § 77.505 because a cable, supplying power to a dis bution center at the motor pit, had not been installed throu proper fittings. This violation was serious because it cont buted to the accident. However, the Solicitor advises that the wall mounted switchbox had been deenergized and locked o (the first violation discussed above) there would have been electrical exposure to the electrician who was killed. In o words, this citation is part and parcel of the entire situat for which Order 2482343 sets forth the principal violation. accept the recommended settlement of $2,000.

lation discussed above). For the reasons already set forth I accept the recommended settlement of $2,500.

The operator is ORDERED TO PAY $9,500 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

George D. Palmer, Esq., Office of the Solicitor, U. S. Departme of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

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Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., Post Office Box C-79, Birmingham, AL 35283 (Certified Mail)

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s. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, N.W., Washington, DC 20006 (Certified Mail)

/gl

TARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
E SAFETY AND HEALTH	:	
INISTRATION (MSHA),	:	Docket No. WEVA 86-76
Petitioner	:	A.C. No. 46-05121-03501
	:	
v.	:	Wayne Mine
	:	
IER-KEMPER CONSTRUCTORS,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

e: Judge Fauver

This case is before me upon a petition for assessment vil penalties under section 105(d) of the Federal Mine ty and Health Act of 1977, 30 U.S.C. 801 et seq. The es have filed a motion to approve a settlement ement and to dismiss the case. I have considered the esentations and documentation submitted and I conclude the proffered settlement is consistent with the eria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of lement is GRANTED and Respondent shall pay the approved lties in the amount of $7,500 within 30 days of this sion. Upon such payment this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

ribution:

rt A. Cohen, Esq., Office of the Solicitor, U.S. Department abor, 4015 Wilson Boulevard, Arlington, VA 22203 tified Mail)

iam H. Howe, Esq., Loomis, Owen, Fellman & Howe, 2020 K et, N.W., Suite 800, Washington, DC 20006 (Certified Mail)

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-43-M A. C. No. 41-03162-05504
v.	:	Chadwick Pit
EL PASO SAND PRODUCTS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements of the eight violations involved in this matter. The originally assessed amounts were $3,600 and the proposed settlements are for $3,600. The Solicitor's motion is wholly inadequate because it does not analyze the violations or demonstrate why the proposed settlements should be allowed beyond reciting the bare conclusion that they are fair and reasonable. Moreover, the Solicitor erroneously refers to section 105(b)(1)(B) of the Act which concerns the Secretary assessment of civil penalties instead of section 110(i) whic sets forth the Commission's authority. However, MSHA's narrative findings fully explain and justify the violations and penalty amounts in light of the statutory criteria set forth in section 110(i). On the basis of MSHA's analysis, I accept the recommended proposals.

Accordingly, the recommended settlements are Approved and the operator having paid, this matter is Dismissed.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-160-M A.O. No. 15-00034-05506
v.	:	Greenville Quarry and Mill
GREENVILLE QUARRIES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: William F. Taylor, Esq., Office of the Solicitc U.S. Department of Labor, Nashville, TN for Petitioner,
Rees Kinney, Esq., Jarvis, Payton and Kinney, Greenville, KY for Respondent

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Subsequent to their opening statements at the hearing on December 6, 1985 at Nashville, Tennessee, the parties jointly moved for approval c a settlement agreement and dismissal of the case. The violations in this case were originally assessed at a total of $1600 and the parties propose to reduce the penalty to a total of $800. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of a settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $800 within 30 days of this decision. Upon payment, these proceedings are DISMISSED.

Roy J. Maurer

Ro J. Maurer

William T. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Rm. 208. U.S. Courthouse, 801 Broadway Nashville, TN 37203 (Certified Mail)

Rees Kinney, Esq., Jarvis, Payton and Kinney, 118 O'Bryan Street, P.O. Box 569, Greenville, KY 42345 (Certified Mail)

/db

CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 85-236
Petitioner	:	A.C. No. 36-02713-03509
v.	:	
	:	Frenchtown Strip Mine
WER OPERATING COMPANY, INC.,	:	
Respondent	:	

SUMMARY DECISION

fore: Judge Koutras

Statement of the Case

This case concerns a civil penalty proposal initiated by e petitioner against the respondent pursuant to section)(a) of the Federal Mine Safety and Health Act of 1977, U.S.C. § 820(a), seeking a civil penalty assessment of $20 r an alleged violation of the reporting requirements of C.F.R. § 50.20(a). The alleged violation is stated in a ction 104(a) citation served on the respondent's representa-ve by an MSHA inspector on April 15, 1985.

The matter was scheduled for a hearing on the merits. wever, the hearing was subsequently cancelled after the rties agreed to submit the matter to me for summary deci-on pursuant to Commission Rule 64, 29 C.F.R. § 2700.64. e parties have filed cross-motions for summary decision, th supporting stipulations and arguments.

Issue

The issues presented here is whether the respondent vio-ted the requirements of 30 C.F.R. § 50.20(a), and if so, e appropriate civil penalty which should be assessed taking to account the requirements of section 110(i) of the Act.

Pub. L. 85-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. §

3. Commission Rules, 29 C.F.R. § 2700.1 et seq

4. 30 C.F.R. § 50.20(a).

Discussion

Section 104(a) Citation No. 2403692, issued on 1985, cites a violation of 30 C.F.R. § 50.20(a), and condition or practice is stated as follows:

> The operator has omitted on Section A, the company name. Section C, No. 9, the condition contributing to the accident. No. 10, equipment involved. No. 11, name of witness to accident, if any, on the Mine Accident and Injury and Illness Report, MSHA Form 7000-1, for accident that occurred on 3-21-85.

The facts in this case are not in dispute. The have stipulated that on March 21, 1985, at 9:30 a.m. Mr. John J. Podliski, a miner employed by the respon slipped while on duty and bruised his right knee. H ued to work the remainder of the work day on March 2 was off from work on March 22, for reasons associate the injury he sustained.

The parties stipulated that the respondent file required accident report with MSHA on March 25, 1985 there is no dispute that when it was filed the compa was omitted from Section A, line two of the report, items 9, 10, 11 of Section C were left blank. Item space provided for the full description of the condi contributing to an accident; item 10 is the space fo ing any equipment involved in an accident; and item space for listing the name of any witness. The cita issued because of these omissions.

In support of the citation, petitioner argues t reporting requirements of 30 C.F.R. Part 50 implemen tions 103(a) and (b) of the Act, and are intended to the statutory objective or acquisition and analysis dent, injury, and illness data for the purpose of re

tion. 44 Fed. Reg. 52827 (1979). Part 50 requires the repor ing of all occupational injuries irrespective of whether ther exists a causal nexus between the miner's work and the injury sustained. Secretary of Labor v. Freeman United Coal Mining Company, 3 MSHC 1447 (1983).

The petitioner points out that the form in question requires the respondent to fully describe the conditions contributing to an occupational injury and to quantify the resul ing damage or impairment. Petitioner maintains that the failure of the respondent to complete question No. 9 on the form on its face violates 30 C.F.R. § 50.20(a), and directly impinges upon MSHA's ability to comprehensively compile data on injury causation factors. Petitioner also believes that a delay in the reporting and description of an occupational injury can impede the investigative capability of MSHA, and that an omission on the reporting form defeats the twin goals of the reporting requirements of Part 50-- swift investigatio of accidents and compilation of injury causation factors. Since these objectives are central to MSHA's efforts at healt and safety regulation, petitioner concludes that the partiall completed form violated 30 C.F.R. § 50.20(a) as a matter of law.

The respondent concedes that the purpose and scope of Part 50 is to implement MSHA's authority to investigate, to obtain and utilize information pertaining to mine accidents, injuries, and illnesses, and that the information received will be used to develop the rates of injury occurrence, and, data respecting injury severity.

Respondent acknowledges that 30 C.F.R. § 50.20-4 sets forth the criteria for completion of Section A of the form, and that this includes identification data such as the mine identification number (I.D.), and the mine and company name. Conceding that the obvious purpose for this information is to identify the mine location and name for investigation purposes, the respondent argues that the information should be read together with the information at the end of the form which requires the name of the person completing the form, the title, date, and the area code and phone number. The respondent asserts that when it provided the mine I.D. numbe the location of its mine, the name of its clerk, and its phon number, MSHA had all the information it needed to promptly investigate. Respondent suggests that had MSHA dialed the

With regard to item No. 9, Section C of the form, respondent points out that 30 C.F.R. § 50.20-6 states the condition contributing to the accident should be described, and that this means stating what happened, reasons therefor, and the factors which contributed to injury and damage. Respondent asserts that these requ ments should be read together with item Nos. 20, 21, a of the form. Respondent points out that in the report it filed on March 25, 1985, it was stated that the emp slipped and bruised his right knee. The amended form MSHA accepted as abatement stated that the employee wa ing around the dozer and sprained knee," and the infor provided in the initial report stated the same "slipp bruising the knee" information, and that nothing more be said.

With regard to item No. 10 as to "equipment," res states that it was left blank since no equipment was Item No. 11 as to "witnesses" was left blank because nesses were involved. Respondent suggests that when the information it submitted on its initial form is re together, MSHA had all the information necessary to ca the purposes of the Act and regulations. Respondent out that even with the amended form which was accepte MSHA to abate the violation, nothing more was added.

Respondent asserts that the alleged violation an posed $20 civil penalty assessment is based on a de m and highly technical construction of the regulations. dent concludes that the information provided was in s tial compliance with the regulation, and was sufficie MSHA to perform its information gathering duties.

Findings and Conclusions

I conclude and find that the injury suffered by Mr. Podliski was an "occupational injury" as defined 30 C.F.R. § 50.2(e), and that it was required to be r on MSHA Form 7000-1, as stated in 30 C.F.R. § 50.20(a While I agree with the respondent's assertion that th mation furnished on the form as originally filed with was in substantial compliance with the reporting requ of section 50.20(a), I conclude and find that the fai the respondent to fully describe the conditions contr

accident victim slipped and bruised or sprained his knee, there is no information to explain how it occurred, what caused the slip, etc. The applicable criteria found in section 50.20-6(a)(3), required that this information be supplied.

Respondent suggests that since the form was filled out by one of its office clerks, the omissions were the result of clerical oversight. While this may be true, I take note of the fact that section 50.20(a) requires that the form in question be completed or reviewed by the respondent's principal officer in charge of health and safety at the mine or the supervisor of the mine area in which the accident or injury occurred. I find nothing in this case to suggest that this was done. It seems to me that the preparation or review of the form by the mine safety officer, or some supervisory foreman at the area where the accident occurred, before it was submitted may have resulted in the full completion of the form and may have prevented the issuance of the citation.

With regard to the respondent's assertion that its failure to include the name of the operator and to complete item Nos. 10 and 11 were de minimus oversights, while it may be true that no equipment or witnesses were involved in the accident, MSHA has no way of knowing that unless the person submitting the form clarifies it by indicating "none" or otherwise explaining it. MSHA may wish to clarify its instruction to preclude future oversights and omissions of this kind. With respect to the omission of the company name, while it is true that the mine I.D. and telephone number were supplied, the requirement that the company name be included on the form seems like a rather basic and innocuous requirement that should be complied with.

In view of the foregoing, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Civil Penalty Assessment

The parties have filed no information concerning the six statutory criteria found in section 110(i) of the Act. However, I take note of the fact that the violation was assessed as a "single penalty" by MSHA. The information contained in the pleadings and proposed assessment made by the pleadings reflects that the respondent is a small operator. I conclude

The respondent IS ORDERED to pay a civil penalty in amount of $10 for the violation in question, and payment to be made to MSHA within thirty (30) days of the date o this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

LADY JANE COLLIERIES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 85-116-R
	:	Citation No. 2403626; 2/5/
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 85-117-R
	:	Citation No. 2403627; 2/5/
	:	Docket No. PENN 85-151-R
	:	Order No. 2403644; 2/21/85
	:	Docket No. PENN 85-152-R
	:	Order No. 2403645; 2/21/85
	:	Stott No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-216
	:	A.C. No. 36-00880-03533
v.	:	Stott No. 1 Mine
LADY JANE COLLIERIES, INC., Respondent	:	

SUMMARY DECISIONS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern two citations issued to the contestant/respondent Lady Jane Collieries (hereinafter Lady Jane), on February 5, 1985, for two alleged violations of mandatory health standard 30 C.F.R. § 90.103(b). The citations were issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a), because of the alleged failure by Lady Jane to maintain the pay status of two "Part 90" miners who were transferred to other jobs. The citations were timely contested by Lady J

Lady Jane timely contested the issuance of these ord
Docket Nos. PENN 85-151-R and PENN 85-152-R. MSHA s
quently filed a proposal for assessment of civil pe
pursuant to section 110(a) of the Act seeking civil
assesments of $90 for each of the alleged violations

The parties mutually agreed to waive a hearing
merits, and agreed to submit the matters to me for
decisions pursuant to Commission Rule 64, 29 C.F.R.
The parties have filed cross motions for summary de
joint stipulation of facts, and briefs in support o
respective positions.

Issues

The principal issue presented in these proceed
whether or not Lady Jane violated the provisions of
§ 90.103(b) by failing to adequately compensate the
90 miners" in question. Additional issues raised b
parties are disposed of in the course of these deci

Stipulations

The parties have stipulated to the issuance of
tions and orders, the size and scope of Lady Jane's
activities, and to the relevant civil penalty asses
teria found in section 110(i) of the Act. The join
tion of facts with respect to the remaining issues
proceedings are as follows:

1. The Stott No. 1 Mine was a medium sized mine producing approximately 200,000 tons annually.

2. Lady Jane Collieries, Inc., is ultimately owned by Pennsylvania Power and Light Company. Captive coal mines owned by Pennsylvania Power and Light Company produced 2,925,361 tons of coal in 1984.

3. Lady Jane employed approximately 100 employees, while operating two active working sections.

5. In the middle 1970's, the company built a cleaning plant which processed the coal from the mine and also from coal purchased from neighboring operations.

6. During 1983, it was determined that the workable coal seam was being exhausted and would in fact be depleted sometime late in 1984.

7. In April 1983, the company met with its employees and informed them of the fact that the mine's life was nearing an end.

8. It then indicated to the employees that at the conclusion of the underground reserves Lady Jane would remain as a surface facility.

9. The surface facility would consist of a preparation plant which would handle coal purchased locally from various operators.

10. The employees were informed that fewer jobs would be available at the plant, probably 15 or 20 as a maximum.

11. The employees were further advised that they would be informed in the near future as to who was chosen to remain at Lady Jane.

12. Additional employees would be afforded opportunities, if they so chose, at either construction jobs at Pennsylvania Power and Light Company or at mining positions with Pennsylvania Mine Corporation and its various related companies.

13. Additionally, the opportunity for severance pay and for early retirement was discussed at a meeting with the employees.

14. On May 23, 1983, a list of personnel to remain at Lady Jane was published. That list included names of personnel and the jobs

15. Shortly thereafter, some employees who were not designated to remain at Lady Jane began to take advantage of jobs with PP&L or PMC. Exhibits 2 and 3 show employee displacement activity as of June 24, 1983 (Exhibit 2) and January 28, 1985 (Exhibit 3).

16. Exhibits 4 and 5 show organization charts of Lady Jane as it existed in 1982 (Exhibit 4) and in August 1984 (Exhibit 5).

17. The underground mining operations at Lady Jane ceased on December 14, 1984.

18. At that time, all underground coal production ceased at Lady Jane; the only underground activity which remained was the recovery of the equipment and the mine sealing work.

19. The equipment recovery took a relatively short time while the mine sealing work currently continues, and it is estimated that the sealing project will be completed sometime prior to the end of 1985.

20. On December 17, 1984, a reorganization took place at Lady Jane. That reorganization is exemplified by an organizational chart (Exhibit 6) which shows the structure of the organization effective December 17, 1984.

21. At that time, Lady Jane began functioning as a coal preparation facility. Coal from various local suppliers was trucked into Lady Jane, processed through its preparation plant and shipped via Conrail to the Sunbury Power Plant of PP&L. The only underground activity that continued was the sealing project which would continue well into 1985.

22. On December 14, 1984, a number of employees were displaced from Lady Jane. Each was given an option election in which they could chose the following:

Option 2 - Early retirement with severance allowance

Option 3 - Severance allowance

Each employee had 30 days following the date of his layoff to make his determination.

23. Prior to December 14, 1984, Arnold McCracken had been employed as the general outside foreman. His job responsibilities were those as listed on Exhibit 7. With the closing of the underground mining operation, many of Mr. McCracken's duties as outside shop foreman were eliminated since a majority of his activities had to do with the repair of underground mining equipment which was no longer called for. Based upon the completion of underground mining, Mr. McCracken's position and that of a number of other employees were terminated as no longer needed.

24. In May 1983, Mr. McCracken had been designated to stay at Lady Jane as a sampler (Exhibit 1). The rate on the sampler position was $10.78 per hour. That rate did not become effective for Mr. McCracken until January 2, 1985, since from December 17 until January 2, he was on vacation (Exhibit 8).

25. In 1983, when positions were assigned for the surface facilities, it was determined by management that Mr. McCracken did not have the necessary experience to perform the position of plant foreman. He had never performed that task in the past, and the incumbent, Clair Ireland, was designated to perform that task subsequent to the termination of underground mining operations at Lady Jane.

26. Some tasks formerly done by Mr. McCracken were now assigned as additional responsibility to Mr. Clair Ireland or other Lady Jane employees; other tasks formerly

involved).

27. On January 2, 1985, Arnold McCracken assumed the position of coal sampler which had been designated to him since May 23, 1983. During that period of time, Mr. McCracken would have had opportunities to move to other facilities of PP&L or PMC had he so chosen. Even though he designated to stay at Lady Jane, he could have opted to transfer as several others on the designated list had done.

28. On January 11, 1985, Mr. McCracken retired.

29. He indicated in his option election form the option of early retirement with severance allowance. This option entitled Mr. McCracken to retire at full retirement even though he had not reached the age of 65 and the severance option permitted him 1 week of severance pay for each full year of Lady Jane service. (Exhibit 10.)

30. On January 15, 1985, Mr. McCracken filed a discrimination complaint with the Mine Safety and Health Administration.

31. In November 1984, Lady Jane was notified by MSHA that Mr. McCracken was a Part 90 Miner who must be working in an environment which meets the respirable dust standard (Exhibit 11).

32. Mr. McCracken was sampled for dust and MSHA was advised by letter dated December 3, 1984, that he was already working in an atmosphere which complied with the reduced standard and there was no need to transfer him from his position as outside foreman (Exhibit Nos. 12 and 13).

33. On January 14, 1985, Lady Jane wrote to MSHA informing them that Mr. McCracken had retired (Exhibit 14).

tion for MSHA, concerning Mr. McCracken's 105(c) discrimination complaint. The Schell letter concluded" "A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that a violation of Section 105(c) has not occurred" (Exhibit 15).

35. On November 9, 1979, Lady Jane was informed that Raymond R. Graham was a Part 90 miner (Exhibit 16).

36. On August 27, 1980, Raymond R. Graham transferred from his position as belt maintenance man to the position of car dropper-surface, retaining his underground rate of pay (Exhibit 17).

37. Pursuant to the May 23, 1983, reorganization plan, Mr. Graham was designated to stay at Lady Jane as a greaser and mechanic (Exhibit 1).

38. On December 17, 1984, the Lady Jane facility was reorganized from a deep mine facility into a surface preparation facility.

39. Immediately prior to December 17, 1984, Mr. Graham's rate of pay was $15.12 per hour as a car dropper. (The normal rate of pay for this surface position was $13.38). Mr. Graham had retained his high rate from underground.

40. On December 17, 1984, Mr. Graham's position was changed from a car dropper-surface to a greaser-surface. His new rate of pay was $13.38 per hour, which is the surface rate of pay.

41. The car dropper-surface position was not eliminated but is currently filled by Ardell Wallace.

"develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the p tion of life and prevention of injuries in coal or othe mines."

Section 101(a)(7) of the Act provides in pertinent as follows:

> [W]here appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazard in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. * * * (emphasis added).

The mandatory health standards covering miners who evidence of the development of pneumoconiosis were prom gated pursuant to section 101 of the Act, and they beca effective on February 1, 1981, 45 Fed. Reg. 80760-80774 regulations appear at Part 90, Title 30, Code of Federa Regulations.

A "Part 90 Miner" is defined at 30 C.F.R. § 90.2, follows:

> "Part 90 miner" means a miner employed at an underground coal mine or at a surface work

under § 90.3 (Part 90 option; notice of eligibility; exercise of option) of this part to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights.

The term "transfer" is defined by 30 C.F.R. § 90.2, as lows:

"Transfer" means any change in the work assignment of a Part 90 miner by the operator and includes: (1) Any change in occupation code of a Part 90 miner; (2) any movement of a Part 90 miner to or from a mechanized mining unit; or (3) any assignment of a Part 90 miner to the same occupation in a different location at a mine.

30 C.F.R. § 90.3(b) and (c) provide as follows:

(b) Any miner who is a section 203(b) miner on January 31, 1981, shall be a Part 90 miner on February 1, 1981, entitled to full rights under this part to retention of pay rate, future actual wage increases, and future work assignment, shift and respirable dust protection.

(c) Any Part 90 miner who is transferred to a position at the same or another coal mine shall remain a Part 90 miner entitled to full rights under this part at the new work assignment.

30 C.F.R. § 90.103 (Compensation), provides in pertinent rt as follows:

(a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the option under § 90.3 (Part 90 option; notice of eligibility; exer-

ferred, the operator shall compensate the miner at not less than the regular rate of pa received by that miner immediately before the transfer.

(c) The operator shall compensate each miner who is a section 203(b) miner on January 31, 1981, at not less than the regula rate of pay that the miner is required to receive under section 203(b) of the Act immed ately before the effective date of this part.

(d) In addition to the compensation required to be paid under paragraphs (a), (b) and (c) of this section, the operator shall pay each Part 90 miner the actual wage increases that accrue to the classification t which the miner is assigned.

Lady Jane is charged with a failure to mainta status of Part 90 miners Arnold M. McCracken (Cita No. 2403626), who was transferred from his occupat side shop foreman to surface coal sampler, and Ray Graham (Citation No. 2403627), who was transferred occupation of surface car dropper to surface greas factual stipulations provide the information upon matter arises. The stipulations reveal that in Ap Lady Jane met with the mine employees and informed the workable coal seam would soon be exhausted and conclusion of the underground reserves, Lady Jane remain as a surface facility. The surface facilit consist of a preparation plant which would prepare chased from various local operators. Arnold M. Mc Raymond G. Graham were employees at Lady Jane at t The employees were further informed that as a resu change in circumstances, fewer than 15 to 20 jobs available at the preparation plant and that a list employees chosen to fill those jobs would soon be The remaining employees would be afforded the oppo go to work at construction jobs with Pennsylvania Corporation and its various related companies.

On May 23, 1983, a list of personnel to remai Jane was posted. The personnel were selected on t seniority and ability to perform the position. Mr name appeared on the list as a sampler. Mr. Graha

ember 17, 1984, Lady Jane began functioning as a coal paration facility.

A's Arguments

In support of its position in these proceedings, MSHA ies on the specific wage protection provisions found in t 90, as well as its comments and policy statements made ing the rulemaking process in connection with the promulga- n of the regulations. The relevant comments deal with the nsfer and compensation rights of the affected miners, and significant area of comment concerns changed circumstances a mine which may require changes in job assignments. These ments are noted in pertinent part as follows at 45 Fed. . 80761:

> The operator may transfer a Part 90 miner without regard to these job and shift limitations if the respirable dust concentration in the position of the Part 90 miner complies with the dust standard, but circumstances require changes in job aesignments at the mine. Reductions in workforce or changes in operational methods at the mine may be the most likely situations which would affect job assignments. Any such transferred Part 90 miners would still be protected by all other provisions under this Part. (Emphasis added.)

Another relevant rulemaking comment relied on by MSHA in nection with section 90.3, is found at 45 Fed. Reg. 80764, l it is as follows:

> Although the incidence of pneumoconiosis among miners in surface occupations is thought to be less than that of underground miners, dust levels in certain surface jobs, for example, at cleaning and preparation plants, may frequently exceed average respirable dust concentrations of 1.0 mg/m^3. Accordingly, under this rule, any Part 90 miner who is transferred by the operator to any surface position, including positions at surface coal mines, remains a Part 90 miner in the new surface job and is entitled to all Part 90

is consistent with Section 101(a)(7) of the Act and
lative history pertaining to the enactment of that s

With regard to the circumstances in connection
citation for failure to adequately compensate Arnold
McCracken, MSHA states that prior to December 14, 19
Mr. McCracken had been employed at Lady Jane as the
outside foreman earning $20.70 per hour. A lot of h
would be eliminated during the conversion of the fac
because as foreman he had been responsible for the r
underground mining equipment. This job would no lon
necessary at the preparation facility. His new posi
the reorganization would be a coal sampler, and the
pay for the sampler position was $10.78 per hour.

By letter dated November 13, 1984, Lady Jane wa
fied by MSHA that Mr. McCracken was a Part 90 miner,
exercised his option to work in a less dusty atmosph
letter informed Lady Jane that by the 21st calendar
receipt of the letter, Mr. McCracken must be working
dust area. If however, he was already working in an
phere which complied with the reduce standard, there
no need to lower the dust concentration or to transf
but he nevertheless retained his Part 90 rights unti
waived them.

In response to this letter, Lady Jane advised M
letter dated December 3, 1984, that Mr. McCracken wa
working in an atmosphere which complied with the red
dard, and thus, there was no need to transfer him to
position. To support its position, Lady Jane took f
ples of dust from Mr. McCracken from December 3, 198
December 7, 1984, which revealed low dust levels.

On December 17, 1984, the date that the reorgan
took effect, Mr. McCracken began his vacation. He d
return to work until January 2, 1985. Upon his retu
January 2, he assumed the position of coal sampler.
January 11, 1985, Mr. McCracken retired pursuant to
option of early retirement with severance pay.

On January 15, 1985, Mr. McCracken filed a sect
105(c) discrimination complaint with reference to hi
fer. During the course of that investigation, secti
Citation No. 2403626 was issued, because Lady Jane h
to maintain Mr. McCracken's pay status as an "outside

reman. He had been transferred to the coal sampler position and paid the coal sampler's lower rate of pay.

In response to Lady Jane's assertions that it had no ligation to continue to pay Mr. McCracken at the rate of y of an outside general foreman because a year and a half rlier, on May 23, 1983, he was made aware of his transfer sed upon the mine reorganization and not his Part 90 atus, MSHA submits that the preamble to Part 90 clearly cognizes no exceptions to the provisions found in Part 90, d that any transfer of a Part 90 miner pursuant to a reduction in work force or change in operational methods does not gate the protections afforded by Part 90. Further, MSHA ints out that any Part 90 miner who is transferred to any rface position, including positions at a surface coal mine, mains a Part 90 miner in the new surface job. MSHA concludes that upon Mr. McCracken's transfer on December 17, 84, his Part 90 rights remained with him, and the record is id of any decision on his part to waive his Part 90 rights. cordingly, MSHA believes that the compensation provisions und at Part 90.103(b) followed Mr. McCracken to his new sition, and his rate of pay as a coal sampler should have en the same rate of pay he received as an outside general reman, i.e. $20.70. MSHA concludes that Lady Jane's failure to compensate him accordingly was clearly a violation of rt 90.103(b), and that the citation was appropriately sued.

With regard to the issuance of the citation in connection with the failure by Lady Jane to adequately compensate aymond S. Graham, MSHA states that on August 27, 1980, . Graham was transferred from his underground position as elt maintenance man to the surface position of car dropper. is transfer occurred as a result of Lady Jane's notification on November 9, 1979, that Mr. Graham was a Part 90 miner o had elected to transfer. As a result of the transfer, . Graham incurred no lost wage rate in that he retained his derground rate of pay.

The May 23, 1983, reorganization plan indicated that . Graham was to remain at Lady Jane as a greaser and echanic. Prior to December 17, 1984, Mr. Graham's salary s that of an underground belt maintenance man, i.e. $15.12 r hour, although he actually worked on the surface as a car

MSHA states that Mr. Graham was transferred from one surface position to another surface position as a result o Lady Jane's change in operational method, and that during this transition he never declined to exercise his Part 90 option. Relying on the rulemakers comments at 45 Fed. Reg 80764, MSHA maintains that Mr. Graham was in fact a Part 9 miner who was protected by the Part 90 provisions at the t of the proposed reorganization, as well as at the time of actual reorganization. Accordingly, his rate of pay as of December 17, 1984, should have continued to have been that an underground belt maintenance man. MSHA concludes that reduction in pay which Mr. Graham incurred as a result of transfer was clearly a violation of section 90.103(b), and that the citation was appropriately issued.

With regard to the issuance of the section 104(b) ord MSHA argues that Lady Jane's failure to abate the violatio within the time allowed by the inspector (February 19, 198 appropriately resulted in the issuance of the orders. Cit Judge Melick's decision in Consolidation Coal Company v. Secretary of Labor, 3 FMSHRC 2201 (September, 1981), MSHA asserts that the criteria for examining the validity of th orders are (1) the degree of danger that any extension wou have caused to miners, (2) the diligence of the operator i attempting to meet the time originally set for abatement, (3) the disruptive effect an extension would have upon ope ting shifts.

Although conceding that the violation did not present any immediate health or safety threat to any miner, MSHA m tains that the violations presented a "chilling effect" up the miner's guaranteed statutory Part 90 rights. Since Congress guaranteed these rights to miners affected by pne coniosis without exception, MSHA concludes that Lady Jane' lack of diligence in attempting abatement, and its continu failure to date to abate the violations, compounds the "ch ing effect" upon statutorily guaranteed compensation right

Lady Jane's Arguments

Lady Jane states that in April of 1983, it met with i employees and informed them that the life of the undergrou mine was coming to an end. On May 23 1983, a list of pers nel to remain at the mine along with job titles was posted On that list Arnold McCracken was listed as a sampler and Raymond Graham was listed as a Greaser-Mechanic. Undergro

Lady Jane asserts that in November of 1984, it was notified that Mr. McCracken had Part 90 status. After Mr. McCracken was sampled for dust, it was determined there was no need to transfer him. On January 2, 1985, Mr. McCrac assumed the position of coal sampler-surface. Prior to the closing of the underground mine, he had been outside shop fo man, but that position was eliminated as of December 14, 198 Prior to December 14, 1985, Mr. McCracken's rate of pay as o side shop foreman was $20.70 per hour and his rate of pay as coal sampler was $10.78 per hour. On January 11, 1984, Mr. McCracken retired, choosing an early retirement with sev ance pay option. On January 15, 1985, Mr. McCracken filed a discrimination complaint with MSHA, and by MSHA letter of April 16, 1985, to Mr. McCracken, it was determined that no violation had occurred. No appeal of that decision has been taken.

Lady Jane points out that it was not notified of Mr. McCracken's Part 90 status until November of 1984. However, in May of 1983, Mr. McCracken had been designated to stay at Lady Jane as a sampler. Under the circumstances, Lady Jane maintains that it did not violate Part 90 in his case by reducing his compensation upon transfer to the sampler position because that designation had been made in May 1983, approximately 6 months prior to Lady Jane being notified of his Part 90 status.

Lady Jane points out that section 101(a)(7) of the Act states in pertinent part that "any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer." However, in Mr. McCracken's case, Lady Jane maintains that no transfer "as a result of such exposure" ever took place. In support of this argument, Lad Jane points out that after it was notified of Mr. McCracken' Part 90 status in November of 1984, he was sampled for dust and MSHA was advised by letter of December 3, 1984, that he was already working in an atmosphere which complied with the reduced dust standard and there was no need to transfer him from his outside foreman position.

Lady Jane concedes that there is a substantial difference in the pay rate of $20.70 an hour received by

Pennsylvania Mines Corporation, but did not do so.
he expects to be paid approximately twice as much pe
of December 17, 1984, as a similarly situated employ
Lady Jane believes that this is windfall which makes
economic sense.

Lady Jane states that Mr. McCracken filed a dis
tion complaint in which he made the following compla

> They transferred me from general outside foreman to sampler at the scales for truck coal and in doing this they cut my wages, and still have another man doing my original job. They said my job was no longer there so if I wanted to work it would be the sampling job.

Lady Jane points out that Mr. McCracken's compl
thoroughly investigated by MSHA, and that on April 1
MSHA made a determination that Lady Jane had not dis
nated against Mr. McCracken, and that a violation of
105(c) the Act did not occur. Mr. McCracken did not
that ruling.

With regard to Mr. Graham, Lady Jane asserts th
November 9, 1979, it was informed that Mr. Graham wa
90 miner. On August 27, 1980, Mr. Graham transferre
his underground position as belt maintenance man to
surface position of car dropper, retaining his under
rate of pay. On May 23, 1983, Mr. Graham was design
stay on after the reorganization as a greaser and me
Immediately prior to December 17, 1984, Mr. Graham's
pay was $15.12 per hour as a car dropper. (The norm
of pay for this surface position was $13.38). Mr. G
retained his high rate from underground. On Decembe
1984, Mr. Graham became a greaser-surface at $13.38
The car dropper surface position was not eliminated,
currently filled by Ardell Wallace. The rate for th
$13.38 per hour. Mr. Graham's previous underground
of belt maintenance man was eliminated on December 1

Lady Jane maintains that the purposes of the Ac
served by requiring it to continue paying Mr. Graham
ground pay rates after the closing of its undergroun

Lady Jane states that although Mr. Graham transferred from the underground mine in August of 1980 and retained his und ground rate of pay until December 14, 1984, when the under- ground mining operation ceased, MSHA would now require Lady Jane to pay him $15.12 per hour when his fellow surface employees are receiving $13.38 per hour for a like position

Lady Jane submits that as of December 14, 1984, it ceased underground coal mining operations and became a sur- face preparation facility only for coal from other mines. Since it was no longer an "underground coal mine" or a "sur face work area of an underground coal mine" as stated in 30 C.F.R. § 90.3(a), Lady Jane maintains that the cited man tory health standard 30 C.F.R. § 90.103(b), is no longer applicable and the citations and orders should be dismissed

Lady Jane argues that the legislative history of the A reflects a congressional intent that Part 90 miners be pro- tected when they are transferred because of a dust problem, and not when they are transferred because of independent legitimate business reasons. Further, Lady Jane argues tha MSHA's Part 90 rules must be interpreted and applied in lig of their underlying statutory goals and purposes, and since it is clear in these proceedings that Mr. McCracken and Mr. Graham were indisputably transferred for legitimate bus ness reasons rather than any dust problems, MSHA's policy determinations with respect to the interpretation and appli tion of its Part 90 rules in these proceedings conflict wit the legislative intent and should not be followed.

Lady Jane submits that MSHA's Part 90 rules should not be interpreted to create a class of "elite miners" who are immune to the economic forces that affect everyone else, an that simply because a miner has exercised his Part 90 optic does not mean that he has acquired economic invulnerability Lady Jane asserts that the rules must be interpreted with a eye to protecting miners who may be developing black lung a to encourage them to exercise their right to transfer, with out, in the process, "turning them into demigods."

Lady Jane submits that so long as no discrimination is shown under the Act, a Part 90 miner should be able to be d charged for cause or laid off as a result of a down turn in employment. So too, given a reorganization from an under-

December 17, 1984, to the present for hours worked. does not believe that a penalty and/or interest woul priate under the instant circumstances. As to Mr. M Lady Jane believes that the pay differential would b ference between $10.78 per hour and $20.70 per hour worked between January 2, 1985, (prior to this Mr. M had been on vacation) when he took the sampler posit January 11, 1985, when he retired (Stip. 36, 37, 38 Exhibit 10). Lady Jane does not believe that a pena interest would be appropriate under the circumstance

Findings and Conclusions

With regard to Mr. McCracken, MSHA does not dis fact that upon elimination of Lady Jane's undergroun operation and the conversion to a surface mining coa tion facility, many of Mr. McCracken's duties as a g outside foreman would be eliminated, and his prior r bilities for the repair of underground equipment wou longer be necessary. MSHA concedes that Mr. McCrack position in the reorganization would be as a coal sa the regular rate of pay of $10.78 per hour for such position.

MSHA takes the position that when Lady Jane was on November 13, 1984, that Mr. McCracken was a Part who had exercised his option to work in a less dusty phere, his rights at a Part 90 miner vested, and the that a subsequent reduction in the work force or cha operational methods resulted in the elimination of t ground mine, including Mr. McCracken's surface posit not divest him of his Part 90 miner rights.

At the time Lady Jane was advised that Mr. McCr Part 90 miner status, MSHA also advised Lady Jane th would be no need to transfer Mr. McCracken if he wer working in an atmosphere which complied with the red standard. Lady Jane advised MSHA that Mr. McCracker already working in an atmosphere which complied with reduced dust standard, and that there was no need to Mr. McCracken. When the reorganization took effect December 17, 1984, Mr. McCracken's prior position as eral outside foreman was eliminated, and he was plac position of coal sampler. He assumed the duties of tion on January 2, 1985, when he returned from vacat

in that capacity until his retirement on January 11,

. McCracken had prior notice that his outside fore-
job would be eliminated and that he would assume the
a coal sampler when Lady Jane posted a list of
ees who were slated to remain at the new surface facil-
May 23, 1983, approximately six months prior to
racken's designation as a Part 90 miner. Under the
tances, I conclude and find that Lady Jane's decision
nection with its reorganized operations and realignment
remaining workforce was communicated to Mr. McCracken
o his transfer option eligibility as a Part 90 miner,
ere is nothing to suggest that the decision in this
was other than a legitimate and good faith business
on made by Lady Jane in the face of changed economic
tances. It seems clear to me that the placement of
racken in the coal sampler position came about as a
of the reduction of the workforce rather than any
ous dust exposure.

conclude that Mr. McCracken was entitled to take advan-
the "wage savings" provisions of section 101(a)(7) of
and 30 C.F.R. § 90.103(b), provided it is established
s placement or "transfer" in the new position was the
result of his exposure to hazardous levels of dust. I
e the transfer language found in section 101(a)(7) to
a showing of a nexus between the dust exposure and
nsfer. The statute requires that a miner exposed to
ous levels of dust be removed from such exposure and
gned. If he is transferred as a result of such expo-
e is entitled to be compensated according to his regu-
e of pay for the job held immediately prior to his
r. The miner's exposure to hazardous dust levels is a
on precedent to his removal and reassignment.

e purpose of the protected wage provisions found in
and rule with respect to Part 90 miners is to encour-
ers to exercise their transfer option to a job in a
sty atmosphere. By not having to take a pay cut upon
r to a position which may pay less, the miner is more
to transfer to protect his health than he would be
se. In Mr. McCracken's case, at the time Lady Jane
ised of Mr. McCracken's Part 90 status no transfer
ac , an Lady Jane had no duty to t nsf r him ecau e

MSHA's argument that Part 90 recognizes no exceptions with respect to the reasons for a miner's transfer IS REJECTED. I find nothing in the legislative history to suggest that Congress intended that an eligible Part 90 miner or potential transferee be forever insulated from the economic realities of the mining business. Nor do I find anything to suggest that a mine operator must forever guarantee a miner's wages in any subsequently acquired jobs which may come about as the result of changed economic circumstances.

I find nothing in the legislative history to suggest that when Congress enacted the remedial provisions of section 101(a)(7), it intended to guarantee a miner continued job security, or to insulate a miner from any future adverse economic consequences which may flow from a mine operator's legitimate business concerns and decisions. Further, I find nothing in the legislative history to suggest that Congress intended to forever penalize a mine operator economically in the case of a Part 90 miner transferee. The intent of the statute is to afford the miner an opportunity to remove himself from dusty work environment, and I take note of the fact that while a transferred miner is entitled to the pay rate of his old position, any future pay increases are based on his new position. If the new position is at a pay rate lower than that of the previous job held by the miner, the miner would only be entitled to future raises computed on the basis of the lower pay scale of the new job classification, notwithstanding the fact that his regular salary remains tied to his former job. It seems to me that had Congress intended to fully guarantee a miner's pay, it would have enacted a provision to ensure that any future salary increases be maintained at the higher rate of pay. However, rather than doing that, Congress placed a special limitation on any subsequent wage increases received by a transferred miner.

I take note of MSHA's rulemaking comments at 45 Fed. Reg. 80767. In referring to the legislative history from the Conference Committee Report, MSHA quotes language which reflects a Congressional concern that miners reassigned jobs pursuant to section 101(a)(7) should not suffer an immediate financial disadvantage. While this suggests an intent that a miner not be penalized economically at the time he exercises his option to transfer to a job in a less dusty atmosphere, it does not suggest that he be forever insulated from the prospects of receiving a lower wage in any future jobs which

I find no rational support for MSHA's suggestion that once transferred, a Part 90 miner is entitled to perpetual wage protection as long as he remains on a mine payroll, even though that mine may no longer fall within the parameters of section 101(a)(7) of MSHA's Part 90 regulations. I note that during the rulemaking comment period when it was suggested that Part 90 miners who are so situated on the effective date of the rules receive retroactive wage increases, MSHA was of the view that there would be no benefit in terms of enhanced health protection to be gained from applying the rule retroactively, 45 Fed. Reg. 80767. Similarly, I cannot conclude that there is any enhanced health benefit to be gained by requiring a mine operator to forever guarantee a miner's wage when he finds himself in another job that is the direct result of changed economic circumstances rather than health or safety circumstances.

I conclude and find that Mr. McCracken's placement in the coal sampler's job was the result of a legitimate and good faith reorganization and reduction in force, rather than an exposure to hazardous dust levels. Under the circumstances, and in view of my findings and conclusions concerning my interpretation and application of section 101(a)(7) and 30 C.F.R. § 90.103(b), I conclude that Lady Jane was under no obligation to maintain Mr. McCracken's pay status as an outside shop foreman at the time he was placed in the coal sampler's job. Accordingly, MSHA has not established a violation of 30 C.F.R. § 90.103(b), and section 104(a) Citation No. 2403626, February 5, 1985, and section 104(b) Order No. 2403645, February 21, 1985, are VACATED. MSHA's civil penalty proposal for the citation IS REJECTED AND DISMISSED.

As stated earlier, the purpose of the wage provision found in the Act and rule with respect to Part 90 miners is to encourage miners to exercise their transfer option to a job in a less dusty atmosphere. By not having to take a pay cut upon transfer to a position which may pay less, the miner is more likely to transfer to protect his health than he would be otherwise. In Mr. Graham's case, his August, 1980, transfer from underground belt maintenance man to surface car dropper was an option exercised by Mr. Graham to preclude his further exposure to hazardous dust, and the transfer was accomplished by Lady Jane in response to MSHA's earlier notification of Mr. Graham's Part 90 miner status.

pying the position of surface car dropper. Although he subsequently designated by Lady Jane in May, 1983, to retained in its employ as a surface greaser after the tive date of the reduction in force and reorganization Jane continued to pay him his underground rate until December 17, 1984, when he actually became a surface g Under these circumstances, it seems clear to me that Mr. Graham's initial transfer and salary retention were plished in full compliance with the applicable statuto regulatory requirements of the law. It also seems cle Mr. Graham's initial transfer in 1980 was the direct r of his Part 90 miner status, and his decision to exerc transfer option. There is no evidence to suggest that that point in time Lady Jane or Mr. Graham had knowled the subsequent chain of events which gave rise to the ization and reduction in force.

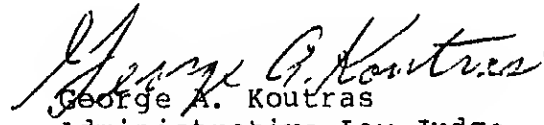
With regard to Mr. Graham's subsequent placement surface greaser position, I conclude and find that it about as the result of the reorganization and reductio force, and not because of Mr. Graham's Part 90 miner s On the effective date of the reorganization, the under mine was no longer in existence, the remaining work fo realigned in accordance with seniority, and Mr. Graham placed from one surface job to another. Even if he ha been a Part 90 miner, the result would have been the s and his options were somewhat limited. He could have resigned, taken optional retirement, or sought employm other positions within Lady Jane's corporate structure obviously opted to stay on as an employee of Lady Jane had no choice as to the position for which he was sele be retained in the realigned work force.

I conclude and find that Mr. Graham's placement i surface greaser's position was the result of a legitim business need of Lady Jane, and that it was the result reduction in force and reorganization, rather than a t resulting from dust exposure. For the same reasons di with respect to my findings and conclusions concerning interpretation and application of section 101(a)(7) an 30 C.F.R. § 90.103(b), in Mr. McCracken's case, I conc and find that Lady Jane was under no obligation to mai Mr. Graham's pay status as a greaser. Accordingly, I conclude that MSHA has established a violation of sect 90.103(b), and section 104(a) Citation No. 2403627, February 5, 1985, and section 104( ) Orde No. 240364

Lady Jane's contentions that the citations and orders should be dismissed because it no longer operates an underground coal mine or a surface work area of an underground coal mine, and therefore 30 C.F.R. § 90.103(b) is no longer applicable, ARE REJECTED. I conclude that at the time of the operative violations in these proceedings, Lady Jane was subject to the provisions of section 90.103(b). When the underground mine was in operation, the surface cleaning plant processed coal from that mine as well as neighboring mines, and it was shipped to the Sunbury power plant of Pennsylvania Power & Light Company. When the underground mine was closed, the surface preparation plant continued to process coal from various local mine operators, and it continued to be shipped to the Sunbury plant. Thus, I conclude that the area of the new surface preparation plant was a surface work area of an underground mine at the time Mr. McCracken and Mr. Graham were designated and placed in their last work positions. I also conclude that the definition of "surface work area of an underground coal mine" found in 30 C.F.R. § 90.2, is broad enough to cover Lady Jane's surface preparation facility.

ORDER

On the basis of the foregoing findings and conclusions, Lady Jane's contests ARE GRANTED, and the citations and orders in question ARE VACATED. MSHA's civil penalty proposals ARE REJECTED, and the civil penalty proceeding IS DISMISSED.



George A. Koutras
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-71-M A.C. 04-00157-05507
v.	:	Cushenbury Cement Plant
KAISER CEMENT CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon Petitioner's motion for approval of a proposed sett ment, and the same appearing proper and in the full amount of initial assessment as to 3 of the 4 violations involved, the settlement is approved.

The terms of the settlement are as follows:

Citation	Date	Health and Safety Standard Violated	Original Proposed Penalty	Settlement Amount
2245606	11/17/83	56.6-113	$2,000	$2,000
2245607	11/17/83	56.6-117	2,000	2,000
2245608	11/17/83	56.6-161	1,000	650
2245609	11/17/83	56.5-112	100	100
		Total	$5,100	$4,750

In the premises, approval of the settlement is warranted

The documentary record in this matter reflects that whil the violations were promptly abated by Respondent, they resul from a high degree of negligence and were of a high degree of gravity since an injury resulted from the improper blasting p cedures practiced.

The reduction in the penalty originally proposed by the Secretary with respect to Citation No. 2245608 appears justi since it is but one of the four infractions charged arising f the same incident and since a question of proof exists as to violation as charged.

In the 24 months preceding the violation, no alleged

be impaired by the payment of the settlement amounts
ified.

In the premises, approval of the settlement is warranted.

Respondent, if it has not previously done so, is ordered to
to the Secretary of Labor within 30 days from the date hereof
sum of $4,750.00.

Michael A. Lasher, Jr.
Administrative Law Judge

ribution:

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s P. Hargarten, Esq., Thelen, Marrin, Johnson & Bridges, Two
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MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 85-242
	:	A.C. No. 46-06805-03509
v.	:	
	:	No. 1 Mine
VOLUNTEER COAL CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlingto Virginia, for Petitioner;
William Stover, Esq., M.A.E. Services Inc., Beckley, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the propose penalty of $800 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under th criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $800 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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William Stover, Esq., M.A.E. Services Inc., 41 Eagles Road

CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 84-98
Petitioner	:	A. C. No. 33-00968-03568
	:	
v.	:	Nelms No. 2 Mine
	:	
JGHIOGHENY & OHIO COAL	:	
CO.,	:	
Respondent	:	
	:	

ADDENDUM TO DISCIPLINARY REFERENCE

Appended to the trial judge's decision of January 22, 86, in the captioned matter was a Disciplinary (Rule 80) ference on Robert C. Kota, counsel for the operator. In pport of Specifications 2 through 6, the trial judge cited ovisions of the Model Rules of Professional Conduct. These es are reflective of the standards of professional conduct posed by Rule 11 of the Federal Rules of Civil Procedure as ended and promulgated in 1983.[1] Three recent decisions United States Courts of Appeals show that amended Rule 11 poses a duty of competence and diligence that is to be dged by a standard of objectivity designed to deter the ling and prosecution of unfounded claims.

Thus, in In Re TIC, Ltd., 769 F. 2d 441, 445 (7th Cir. 85), the Court held that "If a lawyer pursues a path that a asonably careful attorney would have known, after appropri- e inquiry, to be unsound, the conduct is objectively reasonable and vexatious." The Court further held that wyers who continue to litigate even initially plausible aims after it becomes clear they are unfounded violate le 11 Id. at 448-449.

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ule 1(b) of the Commission Rules of Practice provides that any procedural question not otherwise covered by the rules ae Commission or its Judges shall be guided so far as acticable by any pertinent provision of the Federal Rules Civil Procedure as appropriate."

acted in good faith, or that he was personally unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

* * *

In light of the express intent of the drafters of Rule 11, and the clear policy concerns underlying its amendment, we hold that a showing of subjective bad faith is no longer required to trigger sanctions imposed by the rule. Rather sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been imposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Accord: Davis v. Veslan Enterprises, 765 F. 2d 494, 497, n. 4 (5th Cir. 1985).

It is clear that the position taken by counsel for the Operator in this proceeding was based on a legal theory that had been authoritatively rejected and sought remedies for which there was no precedent or statutory authority.

The premises considered, therefore, it is ORDERED that this addendum be made a part of the order of reference in this proceeding.

Joseph B. Kennedy
Administrative Law Judge

99 (Certified Mail)

ert C. Kota, Esq., The Youghiogheny & Ohio Coal Co.,
O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. KENT 85-12 A.C. No. 15-00056-055
v.	:	Jenkins Mine & Mill
ADAMS STONE CORPORATION, Respondent	:	

DECISION

Before: Judge Fauver

This case is scheduled for hearing in Lexington, Ke on April 7, 1986.

Respondent has filed a statement that it will not a the hearing. This statement is deemed to be a waiver of Respondent's hearing rights and a withdrawal of its cont of the Secretary's Proposal for Assessment of Civil Pena

ORDER

WHEREFORE IT IS ORDERED that:

1. The allegations in the Secretary's Order No. 23 January 16, 1985, and amended on January 20, 1985, are d to be true and are incorporated herein as Findings of Fa and Conclusions of Law.

2. Considering the criteria of section 110(i) of t Federal Mine Safety and Health Act of 1977, 30 U.S.C. § et seq., Respondent is ASSESSED a civil penalty of $180 each of the four violations alleged in the attachments t the Secretary's Proposal for Civil Penalty.

3. Respondent shall pay the above-assessed civil penalties in the total amount of $720 within 30 days of this Decision.

William Fauver

William Fauver
Administrative Law Ju

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